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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, ET AL.,

AND

STATE OF TEXAS

Appellants

VS.

J. AND R. DOE, as Guardian Ad Litem for I. Doe, ET AL.,

Appellees

On appeal from the United States Court of Appeals for the Fifth Circuit

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JURISDICTIONAL STATEMENT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

RICHARD L. ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for State of Texas

JOHN C. HARDY
200 Peoples National
Bank Building South
Tyler, Texas 75702

Attorney for Tyler Independent School District

QUESTIONS PRESENTED

1. Whether aliens unlawfully present in the United States are "persons within a state's jurisdiction" as that phrase is used in the equal protection clause of the Fourteenth Amendment.

2. If the Fourteenth Amendment's equal protection clause does apply to persons unlawfully present in the United States, is a state obligated to provide a tuition-free public education to children unlawfully present in the United States?

PARTIES

The parties are the same as in the court below.

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JURISDICTIONAL STATEMENT

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COME James Plyler, Superintendent of the Tyler Independent School District and its Board of Trustees and the State of Texas, by and through their attorneys of record, Richard L. Arnett, Assistant Attorney General of Texas, and John C. Hardy, and file this their jurisdictional statement in the above-captioned cause.

JURISDICTION

On September 14, 1978, the United States District Court for the Eastern District of Texas, Tyler Division, issued a judgment, memorandum opinion and order enjoining officers of the State of Texas from enforcing provisions of Section 21.031 of the Texas Education Code and further enjoined the superintendent and members of the board of trustees of the Tyler Independent School District from denying admission of alien children unlawfully present in the country. The district court's order was pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983. The matter was appealed to the United States Court of Appeals for the Fifth Circuit, No. 78-3311, and that honorable court issued its opinion October 20, 1980, ____ F.2d____.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY PROVISION

TEX.EDUC.CODE §21.031 provides in part:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

STATEMENT OF THE CASE

Appellees brought this action under the Civil Rights Act of 1871, 42 U.S.C.§1983, and the Declaratory Judgment Act, 28 U.S.C.§§2201 and 2202, seeking to challenge the constitutionality of TEX.EDUC.CODE. §21.031. Appellees are children not lawfully present in the country who are seeking a free public educatio in the State of Texas.

The matter was heard on motions for preliminary injunctive relief and motions for permanent injunctive relief in the United States District Court for the Eastern District of Texas, Tyler Division, on September 9, 1977, and December 12, 1977. On September 14, 1978, the district court granted the Appellees' request for permanent injunctive relief. Appellants filed their notice of appeal on October 10, 1978 and October 17, 1978. The United States Court of Appeals issued its opinion on October 20, 1980, which opinion is published at ____F.2d____(5th Cir. 1980), which opinion affirmed the grant of injunctive relief on Fourteenth Amendment grounds reversing on the issues of preemption and international law. The Court of Appeals denied rehearing on November 17, 1980. Notice of appeal from the Court of Appeals order was filed on December 18, 1980.

ARGUMENT

As Mr. Justice Powell wrote in *Certain Named and Unnamed Noncitizen Children and Their Parents v. State of Texas*, ____U.S.____(No. A-179, Sept. 4, 1980), this is the exceptional case where it appears, even before a decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The district court's holding that the equal protection clause applies to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful aliens residing in our country has risen dramatically. In more immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the equal protection clause to unlawful aliens appears likely to remain.

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Aliens who enter the United States illegally are not "persons within a state's jurisdiction" for inclusion under the equal protection clause of the constitution. The phrase "within a state's jurisdiction" appears in the equal protection clause of the Fourteenth Amendment. The word "within" has a unique meaning when illegal aliens are involved. So, too, do words such as "reside" or "domicile" or "dwell."

In cases treating illegal aliens' entry is definitive on any benefits or rights under the immigration laws. In *In re: Simmiolkjier*, 71 F.Supp. 553, 556 (D.C.V.I. 1947), after noting that the Nationality Act of 1940 had no definitions for the term "residence," the court looked to the meaning other quotes had given the word.

> The term 'residence' used in nationality acts is legal residence, and anyone who enters illegally cannot thereby acquire legal residence as a basis for application for citizenship.

The courts have further held that the phrase "reside currently in the United States," when seeking derivative citizenship for minor children, requires a lawful entry. *Schneider v. United States Immigration and Naturalization Service*, 65 F.Supp.227 (D.C.Wash. 1946). Case after case stands for the proposition that the lawful entry requirement in the immigration area is necessary if any rights other than due process rights are to apply. The word "jurisdiction" translates, as cited in *Black's Law Dictionary*, to:

> The word is a term of large and comprehensive import, and embraces every kind of judicial action. (Citations omitted.) It is the authority by which courts and judicial officers take cognizance of and decide cases. (Citations omitted.) It exists when court has cognizance of class of cases involved, proper parties are present, and the point to be decided is within the issues . . . .

Jurisdiction in the sense that most lawyers use it is a concept of power. It is power over a person, and it is power about a subject matter. As used in the equal protection clause, jurisdiction must mean power to act. The states do not have the power to act on illegal aliens as the field of immigration is preempted, and it would be a violation of the supremacy clause for the State of Texas to start deporting illegal aliens within its boundaries.

To say that the phrase "persons within the jurisdiction of a state" has a plain meaning flies in the face of all the decisional law in the immigration field. In *Blake v. McClung*, 172 U.S. 239 (1889), the Supreme Court held that a Virginia corporation was not a person within the jurisdiction of Tennessee. The court noted that the equal protection clause:

> manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.' Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State.

Nonresident aliens have no constitutional right to enter this country. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). If they are here unlawfully, they are not constitutionally entitled to be here, let alone be educated at public expense. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). If here unlawfully, all they are entitled to is the proper functioning of the immigration process as established by Congress, *Shaughnessy v. Mezei*,345 U.S. 206 (1953), and due process to insure that their lives, liberty and property are not unfairly taken, *Mathews v. Diaz*, 426 U.S. 67 (1976).

To find the equal protection clause applicable to undocumented aliens would confer a right that would not be available were they not in this country.

> The child should have no greater rights to a free education, due to his unlawful presence, than those rights he would have had if he had not come to this country.

Hernandez v. Houston Ind. School Dist., 558 S.W.2d 121, 124 (Tex.Civ.App. - Austin 1977, writ ref'd n.r.e.).

Similarly, the court stated in *Burrafato v. United States Department of State*, 523 F.2d 554, 557 (2d Cir. 1975), *cert. den.*, 424 U.S. 910 (1976):

> If Vincenzo were 'legally' within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally. To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstapping and would encourage aliens to enter this country surreptitiously.

The leading authority for the feeling of the Supreme Court on this issue is *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), a case in which the court upheld the right of Congress to condition eligibility for medicare on five years' continuous residence and admission for permanent resident status. This principle was followed in *United States v. Tsuda Maru*, 479 F.Supp. 519 (D.Alas. 1979), in which a Japanese fishing vessel seeking to fish in Alaskan coastal waters alleged that the federal statute favoring the fishing rights of Americans violated its Fifth Amendment right to equal protection. The court pointed out that the "underlying rationale" of the equal protection doctrine was intended to apply only "to persons who have been admitted for permanent residence under the immigration laws." 479 F.Supp. at 521. The court further pointed out that all Supreme Court cases striking down alienage classifications did so in the context of resident aliens who are "in many respects just like citizens," but "the philosophical and legal support for the (equal protection) doctrine is completely absent when a case involves a nonresident alien." 479 F.Supp. at 522. The Alaska court also noted the difference between equal protection and other constitutional rights, including due process. In response to an argument that an alien's right to a fair hearing and fair trial established in *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950), and *Wong Wing v. United States*, 163 U. S. 228 (1896), means that an alien is also entitled to equal protection, the court stated:

> These cases simply stand for the proposition that all persons, illegal aliens included, have basic constitutional rights. They do not support the argument that the equal protection doctrine protecting resident aliens has relevance to nonresident aliens.

479 F.Supp. at 522.

This issue is of major constitutional significance and warrants review by this Court for that reason.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL GAVIA
Chief, State and County Affairs

RICHARD L. ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for State of Texas

JOHN C. HARDY

200 Peoples National
Bank Building South
Tyler, Texas 75702

Attorney for Tyler
Independent School District

J. and R. DOE, as Guardian Ad Litem
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V.

JAMES PLYLER, Superintendent of the
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its Board of Trustees, et al.,
Defendants-Appellants

AND

STATE OF TEXAS
Intervenor-Appellant.

NO. 78-3311.

United States Court of Appeals,
Fifth Circuit.

Oct. 20, 1980.

Appeal from the United States District Court for the Eastern District of Texas.

Before DYER, FRANK M. JOHNSON, Jr., and POLITZ, Circuit Judges.

FRANK M. JOHNSON Jr., Circuit Judge:

Through Section 21.031 of the Texas Education Code, the State of Texas commands the free public education of its children. The State, however, extends that command only to those children legally within its borders.[1] Texas has declined to provide financial aid for the education of alien children who are unable to

[1]Tex.Educ.Code § 21.031 provides in part:

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides the school district.

document the legality of their presence.[2] The Tyler Independent School District (TISD) implemented the policy of Section 21.031 by charging a tuition of $1000 per year for each undocumented child as a prerequisite to enrollment in the Tyler public schools.

A group of undocumented children, represented by their parents, initiated the present litigation against TISD challenging the constitutionality of the statute and the TISD tuition policy. The State of Texas intervened as a party defendant.[3] The United States District Court for the Eastern District of Texas issued a preliminary injunction and ordered that the suit be maintained as a class action.[4] Following a trial on the merits, the district court held that Section 21.031 and the TISD tuition policy violated the equal protection clause of the Fourteenth Amendment, *Doe v. Plyler*, 458 F.Supp. 569, 585 (D.C. 1978), and, alternatively, that the

[2]Tex.Educ.Code § 21.031(a) provides:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

[3]The United States Department of Justice was granted leave to participate in the trial on the merits as an *amicus curiae*. The Justice Department contended in its post-trial brief that Section 21.031 and the TISD tuition policy are not pre-empted by federal legislation but are invalid under the equal protection clause of the Fourteenth Amendment. On appeal the Justice Department also addressed only the equal protection issue.

[4]The class encompassed all undocumented school-age children of Mexican origin residing within the boundaries of the Tyler Independent School District.

policy and statute infringed upon an area pre-empted by federal law[5], *Id.* at 592. We affirm the district court in its holding that the application of Section 21.031 to undocumented alien children is a violation of equal protection clause. We do not agree with the conclusion of the district court that the policy and statute infringe upon an area pre-empted by federal law.

[5]The United States District Court for the Southern District of Texas in *In re Alien Children Education Litigation*, ____F.Supp. ____, 49 U.S.L.W.2088 (S.D.Tex. July 21, 1980) recently confronted a state wide challenge to Section 21.031 of the Texas Education Code. That court found Section 21.031 to be violative of equal protection guarantees and accordingly enjoined the State of Texas from denying free public education to any child due to the child's immigration status. Upon motion by the State a panel of the Fifth Curcuit stayed the injunction without opinion. Justice Powell, Circuit Justice for the Fifth Circuit, subsequently vacated the stay. *Certain Named and Unnamed Noncitizen Children and Their Parents v. Texas*, ____ U.S. ____, 101 S.Ct., ____, 65 L.Ed.2d ____(Sept. 4, 1980). In his opinion, Justice Powell cautioned that interim decisions of the Court of Appeals should be disturbed only upon the weightiest considerations, and that "there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision." Id. at ____, ____ S.Ct. at ____. Noting that the case presents a difficult question of constitutional significance, Justice Powell characterized the case as one for which there is a reasonable probability that the Supreme Court will eventually grant certiorari or note probable jurisdiction. After briefly surveying the applicable cases bearing on the merits, Justice Powell wrote:

> Although the question is close, it is not unreasonalbe to believe that five members of the Court may agree with the decision of the District Court . . . . (This vacation) recognizes that the (district) Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

Id, at ____, 101 S.Ct. at ____(emphasis added).

Section 21.031 was enacted as a response to the complex problems caused by the influx of illegal immigrants into the United States. The hope of obtaining jobs, coupled with the unwillingness or inability of the federal government to enforce its immigration laws, has enticed thousands of young Mexicans[6] to leave their native country and illegally enter the United States. It is undisputed that, compared to United States citizens as a whole, illegal aliens constitute a disadvantage group. But as bad as their living and working environment is in the United States, it is apparently better than what they would experience in Mexico; thus these aliens continue to illegally cross the border. Because they are within this country illegally, they often do not receive the benevolent protections of the law, for they know that to invoke government protection would subject them to return to their native country. Hence, the rights of these illegal aliens and the corresponding responsibilities of the states toward them have not been litigated to an appreciable degree.

[6]Mexican nationals are not the sole target of Section 21.031, which includes all aliens whose presence in the United States is not legal. The vast majority of the excluded class, however, are Mexican nationals, and plaintiffs represent the class of school-age Mexicans excluded from free public schools by Section 21.031.

In Texas, as well as other border states, the illegal immigration of aliens is a hotly debated, many-faceted political and economic issue.[7] A large part of the controversy surrounding illegal immigrants springs from the resentment that the federal government is not enforcing its immigration laws and the fears that the aliens illegally residing in the United States wil depress local labor markets or drain states' social programs. These fears, some of which are grounded in fact, serve as the basis for statutes such as Section 21.031.

Just as the illegal immigration problem is itself fraught with emotions, so too is the means Texas has chosen to deal with its illegal immigration problem.

[7]Depending upon political viewpoint, illegal immigration can be described as either desirable or undesirable. Illegal aliens can generally be hired to work for substandard wages under substandard conditions, which results in significant savings to their employers. If these savings are passed on to consumers, many people realize small economic gains. On the other hand, the humanistic goals sought by labor reforms in the United States are circumvented. Moreover, illegal aliens displace legal residents from potential employment, a fact not of small significance in times of unemployment. Finally, because illegal aliens working in the United States are often supporting a family in Mexico, the money sent to Mexico contributes to an imbalance of payments between the two countries. See Preliminary Report of the Domestic Council Committee on illegal Aliens. Dec. 1976; see generally Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 2 Immig. & Nat'lty L. Rev. 177 (1978).

Because denying a person a basic education is tantamount to ensuring that the person remains at the lowest socio-economic level of modern society, the operation of Section 21.031 yields particularly harsh results.[8] Juxtaposed against the model of equality of opportunity toward which the United States government is dedicated, these harsh results give rise to strong emotional feelings. It is with this background in mind that we address the legal issues in this case.

I. PRE-EMPTION

The district court applied the tests enunciated by the Supreme Court in *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), to determine whether the Texas statute impermissibly interfered with federal law and was

[8]Expert testimony was presented that "the exclusion of a child from education locks the child into a life of poverty. Very frequently the unavailability of upward mobility leads to frustration. In some cases it leads even to socially undesirable behavior." Record of Trial Proceedings at 128-29. Furthermore, the consequences of educational deprivation are more severe for a poor child of Mexican descent living in Texas than for a child from an affluent, nonminority family because the poor Mexican child is less likely to have family members in a position to help him secure employment. *Id.* One of the defendants' witnesses, under questioning by the court, conceded that the plight of an uneducated, illegal alien approaches a state of serfdom. *Id.* at 246.

thus pre-empted by the supremacy clause of the Constitution.[9] We agree that the *De Canas* standards govern the present case; however, in applying those standards, we reach a conclusion contrary to that of the district court.

The Supreme Court in *De Canas* reviewed a California statute that subjects to criminal as well as civil penalties employers who knowingly employ aliens "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." Cal. Lab Code § 2805(a) (West Supp. 1980). Recognizing that the power to regulate immigration unquestionably rests exclusively in the federal government, the Court stated that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power. . . ." *De Canas*, *supra*, 424 U.S. at 355, 96 S.Ct. at 936. The Court therefore concluded that the California statute had not invaded the federal sphere of immigration regulation.

9. U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supreme Court then inquired whether the statute regulated a field that Congress alone occupies and was thus invalid under the supremacy clause. The Court observed that such a determination should be reached only if "'the nature of the regulated subject matter permits no other conclusion, or [if] the Congress has unmistakably so ordained.'" *Id.* at 356, 96 S.Ct. at 937 (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)). Examining the Immigration and Nationality Act [INA], 66 Stat. 163, as amended, 8 U.S.C.A. § 1101 *et seq.*, the Court determined that the INA is mainly concerned with "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas, supra* 424 U.S. at 359, 96 S.Ct. at 938. The Court ascertained congressional concern over the employment of illegal aliens to be, at most, peripheral. On the other hand, regulation of employment falls under the traditionally broad police power of the states. Finding no clear intent of Congress to "preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular," *id.* at 358, 96 S.Ct. at 938, the Court ruled that California was not congressionally ousted from regulating the employment of illegal aliens.

Granting the existence of room for state regulation, the Court opined that the statute must fall if it obstructs "'the accomplishment and execution of the full purposes and objectives of Congress. . . .'" *Id.* at 363, 96 S.Ct. at 940 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1971); *Florida Lime and Avocado Growers, supra*, 373 U.S. at 141, 83 S.Ct. at 1216). The Court remanded on this issue to allow the state court to determine whether the statutory phrase "entitled to lawful residence" would be interpreted consistent with federal law.

[1] The *De Canas* case clearly teaches that Section 21.031 of the Texas Education Code may be invalidated on preemption grounds only if, first, Congress has clearly and manifestly evidenced an intent to occupy the field of education of

illegal aliens or, second, if Section 21.031 is an obstacle to the achievement of a congressional purpose. The district court did not address the former criteria, but found that the latter criteria mandated invalidation of the statute. Plaintiffs do not ask that we consider the federal occupation issue, but urge us to accept the finding of the district court that Section 21.031 is an obstacle to the achievement of federal legislative purposes and is thus pre-empted. After reviewing the relevant federal policy, we conclude that the perceived conflicts are at most illusory and that Section 21.031 does not conflict with federal policy.[10]

The district court perceived a conflict to arise between the federal policy of apprehending illegal aliens at the border or at their places of employment and the state policy of treating illegal aliens as second-class citizens. But the federal government also denies illegal aliens federal largess, 7 U.S.C.A. § 2015(f) (excluding illegal aliens from participation in the food stamp program); 42 U.S.C.A. § 1382c(a)(1)(B) (excluding illegal aliens from supplemental security income for the aged, blind, and disabled); Aid to Families with Dependent Children, 45 C.F.R. § 233.50 (1979) (excluding illegal aliens);

10. *See* Catz & Leonard, *Federal Pre-emption and the "Right" of Undocumented Alien Children to a Public Education: A Partial Reply*, 6 Hastings Const.L.Q. 909 (1979); Kane & Velarde-Munoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 Hastings Const.L.Q. 461 (1978).

Medicaid, 45 C.F.R. § 248.50 (1976) (to be recompiled at 42 C.F.R. § 448.50) (excluding illegal aliens); *see also* 5 C.F.R. § 7.4 (1980) (excluding all aliens from most federal jobs), and we think it not inconsistent with that federal policy for Texas to likewise deny illegal aliens its largess.[11]

Citing the Elementary and Secondary Education Act and Amendments, 20 U.S.C.A. § 2701, *et seq.* (West Supp. 1980), and the Protocol of Buenos Aires, 21 U.S.T. 607 (amending the charter of the Organization of American States, 2 U.ST. 2394) the district court also concluded that Section 21.031 conflicts with a strong federal commitment to education, spe-

11. Although we find the denial of state benefits in general to be consistent with federal policy, we make no finding concerning the constitutionality of denials of state benefits. Actions that are constitutional when taken by the federal government pursuant to its power to regulate immigration may be unconstitutional if taken by a state. It goes without saying that the federal government cannot authorize, either explicitly or impliedly, the states to take unconstitutional action.

cifically the education of disadvantaged children.[12] The federal statute relied on by the district court, however, is merely a funding provision that establishes prerequisites for the receipt of federal aid. *See* [1965] U.S. Code Cong. & Admin. News at 31. Even if Section 21.031 serves to disqualify Texas from the receipt of federal aid, a question on which we express no opinion, the statute certainly does not require the

12. The commitment of the federal government to education is reflected in its many programs designed to aid the states in providing education to the children within their boundaries. *See generally* Elementary and Secondary Education Act and Amendments, 20 U.S.C.A. § 2701 *et seq.* In particular, Congress has given financial assistance to the states to establish special programs for the economically disadvantaged child, 20 U.S.C.A. § 2722; programs for the migrant child, 20 U.S.C.A. § 2761; and programs for the delinquent child, 20 U.S.C.A. § 2781. Congress has not, however, excluded undocumented children from these programs. While its silence on the subject could be taken as assent to allowing undocumented children to participate and as an agreement to partially fund their participation, the mere silence of Congress does not convince us that Congress intended to mandate the admission of undocumented children to free public schools. Indeed, in establishing the Department of Education, the Congress intimated that it was concerned not with aliens, but with citizens. Setting forth its findings, Congress stated:

> The Congress finds that (1) education is fundamental to the development of individual *citizens* and the progress of the Nation; (2) there is a continuing need to ensure equal access *for all Americans* to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex.

20 U.S.C.A. § 3401 (emphasis added). *But see* 20 U.S.C.A. § 3402 (one of the purposes of establishing the Department of Education is "to strengthen the Federal commitment to ensuring access to equal educational opportunity *for every individual*").

states to provide a free public education to children whose presence in this country is illegal. Likewise, the Protocol of Buenos Aires, *supra*, 21 U.S.T. 607, 671, which has never been considered self-executing, recognizes the desirability of providing education to all children, but does not indicate a clear commitment to educating children illegally in the country.[13]

Plaintiffs essentially argue that since the federal government has repeatedly indicated its desire to extend quality education to all children, and specifically to disadvantaged children, but has never excluded undocumented children from its educational programs, Congress intended any program that denies undocumented children access to free basic education to be pre-empted. Plaintiffs' position is plausible, though not persuasive. Indeed, Congress may have intended to ensure a free education to all children within the United States. But we find no evidence that this was the express or

13. The Protocol of Buenos Aires provides:

> The member states will exert the greatest efforts, *in accordance with their constitutional processes, to ensure the effective exercise of the right of education* on the following basis:
> (a) Elementary education compulsory for children of school age, shall be offered to all others who can benefit from it. When provided by the State it shall be without charge.

21 U.S.T. 607 (emhasis added). Nothing in our decision today is meant to imply that it is beyond the power of the federal government to "ensure the effective exercise of the right to education." We only hold that Congress has not so acted.

implied[14] intent of Congress, and in the absence of such an intent we are "'enjoin[ed from] seeking our conflicts between state and federal regulation where none clearly exists.'" *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130, 98 S.Ct. 2207, 2216, 57 L.Ed.2d 91 (1978) (quoting *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45, 86 S.Ct. 1254, 1260, 16 L.Ed.2d 336 (1966); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960).

II. EQUAL PROTECTION

[2.3] A. The scope of the Equal Protection Clause

> No state shall . . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. It is undisputed that the Fourteenth Amendment due process protections extend to aliens, even if they are in the United States illegally. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). Similarly, aleins legally residing in the United States are entitled to the equal protection of the laws as guaranteed by the Fourteenth Amendment. *E.g.*, *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Whether aliens illegally

14. "[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that *which needs be implied is of no less than that which is expressed.*" *Savage v. Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 726, 56 L.Ed. 1182 (1912) (emphasis added).

residing in the United States are entitled to equal protection of the laws, however, has never been squarely addressed by the Supreme Court. For the reasons stated below, we conclude that all aliens—even those illegally within the territorial boundaries of the United States—are entitled to the equal protection of the laws.[15]

By its terms the Fourteenth Amendment prohibits the states from denying equal protection of the laws to "any person within its jurisdiction." We think that aliens illegally within this country are clearly persons within the jurisdiction of the state in which they reside and thus fall under the simple language of the Fourteenth Amendment. The defendants argue that an alien illegally within the territorial boundaries of the United States is not a person *within the jurisdiction* of the state. In support of this contention appellants cite *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958), a case in which an alien who was not admitted to, but was paroled within, the physical boundaries of the United States was held not to be "within the United States" under the provision of the Immigration and Nationality Act

15. *See Bolanos v. Kiley*, 509 F.2d 1023 (2d Cir. 1975) (dicta that equal protection extends to illegal aliens).

she sought to invoke.[16] As noted by the *Leng May Ma* Court, the question presented was "wholly one of statutory construction." *Id.*at 187, 78 S.Ct. at 1073. Furthermore, the decision in *Leng May Ma* turned on *presence* within the United States; jurisdiction of the United States or of any state was not in issue. We therefore find *Leng May Ma* inapplicable to the present situation.

While the Supreme Court has never explicitly addressed whether the equal protection clause extends to illegal aliens, the Court in *Wong Wing*, *supra*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140, indicated that the Fourteenth Amendment does afford illegal aliens the equal protection of the laws. In *Wong Wing* the Court stated:

16. The alien in *Leng May Ma* came to the United States seeking legal entry, claiming that she was a citizen. Pending determination of her claim she was held in custody for more than a year and then released on parole. She failed to establish her claim of citizenship and consequently was ordered excluded. Alleging that she would be persecuted in her native country, she then sought to invoke Section 243(h) of the Immigration and Nationality Act, which authorized the Attorney General to "withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution . . ." 8 U.S.C. § 1253(h). Noting that the parole of aliens seeking admission is a humane device used to avoid needless confinement, the Supreme Court examined corresponding provisions of the INA and determined that Congress intended the provision of the INA to affect a paroled alien and an alien seeking admission in a similar manner. The Court found persuasive the section of the INA providing for the parole of aliens, which provided that the parole of an alien "shall not be regarded as a admission of the alien . . . [and the alien's case] shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5). Since aliens held in custody pending entrance were not within the jurisdiction of the United States within the meaning of Section 243(h), the Court refused to extend the coverage of that section to aliens paroled within, but not admitted to, the United States.

> [I]n the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' Those provisions are universal in their application to *all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*" Applyng this reasoning to the Fifth and Sixth Amendments, it must be concluded that *all persons within the territory of the United States are entitled to the protection guaranteed by those amendments*, . . .

Id. at 238, 16 S.Ct. at 981 (emphasis added).

[4,5] Finally, the logic of the Fourteenth Amendment counsels that illegal aliens were intended to be afforded equal protection of the laws. Observing that Texas is not bound to provide an education for aliens residing in their native countries, the defendants argue that it is illogical to require the states to grant educational benefits to aliens illegally within the United States solely because the aliens violated the federal immigration laws and entered the country illegally. This contention, however, fails to acknowledge the jurisdictional predicate of the equal protection clause. In light of this predicate, and in light of the settled recognition of due process rights attaching upon mere illegal entry into the country,[17]

17. Aliens who seek entry to the United States are not granted Fourteenth Amendment due process rights. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950). On the other hand, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Shaughnessy, supra*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953).

we find no merit to this argument.[18] The defendants also urge that it is illogical to allow the federal government to deny benefits of its social programs to illegal aliens, *see Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), and then to disallow the states from similarly denying the benefits of their programs. But the federal government may withhold benefits from legal aliens, *id.*, when at the same time the states must afford legal aliens equal protection of the laws, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). The illogic perceived by defendants is nothing more than a failure to recognize that the denial of federal benefits rests on the power of the federal government to regulate immigration—a power that was not reserved to the states.[19]

Defendants have advocated no plausible argument suggesting that the equal protection clause does not extend to aliens illegally within the country, and we are similary unable to formulate any such argument. Indeed, when we consider the ultimate results that would obtain if illegal aliens were

18. We reject the intimation that the due process guarantee, which guards against deprivation of rights, is somehow more basic to our constitutional scheme than the equal protection guarantee, which ensures that a person will not be excluded from a government benefit when other persons with similar characteristics are included.

19. ". . . Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8, 97 S.Ct. 2120, 2124 n.8, 53 L.Ed.2d 63 (1977).

not afforded the equal protection of the laws,[20] we are convinced that the Fourteenth Amendment means what it says: All persons within the jurisdiction of a state are entitled to the equal protection of the laws of that state.

B. The Applicable Standard of Review

[6] Having determined that the states are constitutionally bound to afford equal protection of the laws to illegal aliens, we now consider the appropriate standard to be applied in reviewing Section 21.031 of the Texas Education Code. If this challenged law threatens a fundamental right or impacts upon a suspect class, we must strictly scrutinize the law and uphold it only if it precisely tailored to further a compelling government interest. *E.g., Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333, 22 L.Ed.2d 600 (1969). On the other hand, if Section 21.031 does not threaten a fundamental right or impact on a suspect class, we must uphold it if it bears some rational relationship to a legitimate government objective.[21] We briefly address the parties' arguments.

20. For example, if illegal aliens were not afforded equal protection of the laws, what would invalidate a state statute that established the maximum penalty for theft at 10 years if committed by a citizen or legal alien, but at 50 years if committed by an illegal alien?

21. An intermediate standard of review requiring distinctions to be substantially related to legitimate state interests has been suggested in cases involving sex classifications, *see, e.g., Craig v. Boren*, 429 U.S. 190, 204, 97 S.Ct. 451, 460, 50 L.Ed.2d 397 (1976) and classifications drawn on the basis of illegitimacy, *e.g., Lalli v. Lalli*, 439 U.S. 259, 268, 99 S.Ct. 518, 524, 58 L.Ed.2d 503 (1978). *See generally* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1 (1972). It is sufficient for the analysis of the case at hand, however, to rely on the traditional two-tiered model.

Plaintiffs initially contend that strict scrutiny is appropriate because the effective total exclusion from free basic education by Section 21.031 is a denial of a fundamental interest, namely, education. We recognize that education has yet to be classified as a fundamental interest sufficient to invoke strict scrutiny under the equal protection clause; but neither this Court nor the Supreme Court has ever been faced with a statute absolutely barring some resident children from all access to free public education. Indeed, although the Supreme Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), indicated that relative deprivation of educational benefits does not violate equal protection, the Court expressly left unanswered the question whether an absolute bar to free educational benefits would be constitutional. *Id.* at 25 n. 60, 93 S.Ct. at 1292 n.60. However much we are impressed with the importance of basic education to a child's development,[22] we find no solid constitutional precedent for determining that some kind of access to basic education is a fundamental interest sufficient to invoke strict scrutiny. Nevertheless, in light of the Court's *Rodriguez* opinion, we decline to find that complete denial of free education to some children is not a denial of a fundamental right.

Plaintiffs next assert that a heightened standard of review is appropriate because the undocumented children are being punished for the acts of their parents, acts for which they bear no responsibility. Conversely, defendants urge that the illegal alien children are being placed in the excluded classification solely because of their own illegal status. While de-

22. The Supreme Court has recognized that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). The importance of education, however, does not transform what is essentially a state-provided bounty into a constitutionally guaranteed right. *Rodriguez, supra*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16.

fendants correctly state the differentiations contained in the statute, they ignore the realities underlying the plaintiff children's status as illegal aliens. The plaintiffs undeniably stand in violation of federal law, but certainly they have committed no moral wrong. As children they are under the actual and legal control of their parents.[23] To suggest that plaintiffs are being excluded from education for their own illegal actions places form over substance.

[7] Finally, the plaintiffs contend that strict scrutiny is the appropriate standard of review because the legislation impacts on a suspect class, namely, aliens. In support of this argument, the plaintiffs cite numerous cases in which the Supreme Court has held lawfully admitted aliens to be a suspect class. *See Nyquist v. Mauclet*, 432 U.S. 1, 9, 97 S.Ct. 2120, 2125, 53 L.Ed.2d 63 (1977); *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, 601–02, 96 S.Ct. 2264, 2280–2281, 49 L.Ed.2d 65 (1976); *In re Griffiths*, 413 U.S. 717, 721, 93 S.Ct. 2851, 2854, 37 L.Ed.2d 910 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 642, 93 S.Ct. 2842, 2847, 37 L.Ed.2d 853 (1973); *Graham v. Richardson*, *supra*, 403 U.S. at 372, 91 S.Ct. at 1852. *Cf. Ambach*, *supra*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (applying governmental function exception to strict scrutiny and upholding state statute disallowing aliens to work as public school teachers); *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287(1978) (applying governmental function exception to strict scrutiny review and upholding state statute disallowing aliens to work as policy officers); *Perkins v. Smith*, 370 F.Supp. 134 (D.Md.1974) (three-judge panel), *aff'd mem.*, 426 U.S. 913, 96 S.Ct. 2616, 49 L.Ed.2d 368 (1976) (applying governmental function exception and upholding state statute excluding aliens from jury

23. Texas grants parents the right to have physical possession of their children and the right to establish their children's legal domicile. Tex. Fam. Code § 12.04(1) (Vernon Supp. 1980). Additionally, Texas imposes on parents the duty to control their children. *Id.* § 12.04(2).

duty). But this is not a case of the Texas Legislature drawing lines on the basis of mere alienage; if it was, strict scrutiny would clearly be the correct test. *Nyquist v. Mauclet*, 432 U.S. at 7–9, 97 S.Ct. at 2124–2125. Rather, the state of Texas has differentiated between, on one hand, school-age citizens and lawful aliens residing in Texas and, on the other hand, anyone else, including but not limited to aliens illegally residing in Texas.[24] We find no basis to conclude that a statute treating all legal aliens similarly is *per se* subject to strict judicial scrutiny.[25]

24. Section 21.031 excludes from free public education persons outside the State of Texas as well as undocumented residents within its jurisdiction of Texas are entitled to the equal protection of the laws of Texas, the excluded group residing outside the State cannot claim a Fourteenth Amendment right to attend Texas schools. Thus, the only group within the statutory age limitations able to raise an equal protection challenge is the group of illegal alien residents.

25. In *Nyquist, supra*, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, the Supreme Court reviewed a New York statute that denied state benefits to resident aliens who refused to indicate their intent to become United States citizens. New York contended that strict scrutiny was inapplicable because the statute drew distinctions only within the class of aliens and was thus not based on alienage. The court handily rejected this contention, saying that "[t]he important points are that [the New York statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9, 97 S.Ct. at 2125 (footnote omitted). Since the Texas statute is directed at and only harms aliens, it appears at first glance that strict scrutiny is mandated by the *Nyquist* rationale. But a careful study of the cases from which the alienage suspect status developed demonstrates that the suspect status was granted to the class of legal aliens. *See Nyquist, supra*, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63; *Examining Board of Engineers, supra*. 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65; *In re Griffiths, supra*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910; *Sugarman, supra*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853. Therefore, although a statute that discriminates against some, but not all, legal aliens on the basis of some characteristic of alienage is subject to strict scrutiny, a statute that discriminates in favor of all legal aliens is not *per se* subject to judicial review.

[8] Of course, the characteristics of the group of illegal aliens excluded from benefits under Section 21.031 may be such that suspect status is proper. As stated by the Supreme Court in *Rodriguez, supra*, 411 U.S. at 28, 93 S.Ct. at 1294, suspect status is accorded those groups that are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Defendants do not seem to controvert that plaintiffs fall into the above definition; instead, they suggest that the plaintiff children are, by virtue of their violation of the federal immigration laws, deserving of state-imposed disabilities, purposeful unequal treatment, and political powerlessness. Plaintiffs' violation of federal immigration laws *may* constitutionally give rise to disabilities and unequal treatment imposed by the federal government. *See Mathews, supra*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478. Moreover, we recognize that plaintiff's status as aliens may constitutionally support their exclusion from the governing functions of the states. *Ambach, supra*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49; *Foley, supra*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287. But we have ascertained no legal precedent for determining that the commission of a federal misdemeanor[26] may *in and of itself* serve as the legitimate basis for state-imposed disabilities.

26. Illegal entry into the United States is a misdemeanor for the first commission, punishable by imprisonment of not more than 6 months duration and/or a fine of not more than $500. 8 U.S.C. § 1325.

[9] For any of the above reasons or for a combination of the above reasons,[27] this statutory classification may be deserving of strict judicial scrutiny. But we need not dwell on that difficult decision, for we find that Section 21.031 is constitutionally infirm regardless of whether it is tested using the mere rational basis standard or some more stringent test.

C. The Statute Reviewed

The defendants rely on various arguments to justify the constitutionality of Section 21.031. First and foremost, the defendants assert that the State may use its limited amount of funds available for education to protect the *rights* of citizens and those who are legally admitted.[28] The right sought to be protected by the State is the access of legal aliens and citizens to what the defendants term adequate free education. We point out that while the absolute denial of education might well be a denial of a constitutionally protected right, no Supreme Court authority squarely holds to that effect. Furthermore, if illegal aliens are granted free education, legal aliens and citizens will not be absolutely deprived of a free education. At most, the quality of education they receive will decline, and a mere decline in the quality of education that falls equally on the entire population does not give rise to a claim of constitutional dimension. *See Rodriguez, supra*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16. Hence, what the defendants refer to as a right can best be described as a state-

27. The district court suggested that strict scrutiny might be applicable in cases in which a "state acts independently of the federal exclusionary purposes, accepts the presence of illegal aliens, and then subjects them to discriminatory laws." 458 F.Supp. at 583. We have no need to resort to this novel approach, which would require detailed factual determinations and which could render similar statutes void in Texas but valid in other states.

28. Brief for Appellant Tyler Independent School District at 35.

provided bounty to which citizens and legal aliens become entitled solely because of the equal protection clause of the Fourteenth Amendment.[29] Regardless of terminology, the basic thrust of the defendants' position is the same: Texas concluded that, in order to protect the education of documented children, it must decrease or avoid increasing the total cost of education; to accomplish this result Texas excluded undocumented children from its free public schools.

Citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the defendants suggest that because the cost of a government program is at issue, this Court should defer to the legislative judgment of what is wise economic policy. But our inquiry is not whether Texas made a wise decision; our inquiry is confined to the narrow limits of whether Texas made a choice consistent with the Constitution. Moreover, we agree that courts should be hesitant to interfere with legislative decisions concerning the financing of governmental programs. It is not within the expertise of this Court to decide the wisest way to handle the complex problems of financing a public school system. Put more accurately, it is not the function of this Court, or any other court, to make such decisions. But we are not at liberty to ignore a violation of the Constitution merely because a state clothes its actions in economic phraseology.

29. If the Texas statute allowed illegal aliens to attend school free of charge, we have no doubt that a citizen's challenge based on the relative deprivation of education would have no merit.

Texas strongly urges that decreasing its costs is a rational justification for Section 21.031.[30] To accept this contention would mean that cost, *in and of itself*, could justify the exclusion of any group of people from any government program that requires funding. This is clearly not the case. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973) (applying rational basis test); *see e.g., Graham v. Richardson*, *supra*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (strict scrutiny test); *Shapiro v. Thompson*, *supra*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (compelling state interest). We think it clear that a state's desire to save money cannot be the basis of the total exclusion from public schools of a group of persons who are entitled to the equal protection of the laws of Texas and who share similar characteristics with included children.

Texas insists that the saving point of its argument is that the excluded children do not share the characteristic of legal-

30. The parties hotly debated whether excluding illegal aliens would increase the quality of education available to citizens and legal aliens. The district court found that since state funds are allocated on the basis of average daily attendance within each district, a decrease in enrollment would diminish the amount of funds received by a district. Because many of the costs of education are fixed rather than variable, the district court reasoned that a school district may be forced to increase the funding received from local sources or cut back on its programs. The Court therefore concluded that excluding undocumented children from public schools would not necessarily improve the quality of education received by citizens and legal aliens. We find no reason to disturb the district court's finding of fact, but we also see no reason to base our decision on it. Our decision today would be no different if Texas could conclusively prove that excluding undocumented children from its schools raised the quality of education available to citizens and legal aliens.

ity of presence with included children.[31] This would be a point well taken but for the fact that the undocumented children fall within the ambit of the equal protection clause. In light of the application of the equal protection clause, however, Texas may not justify its discrimination by a mere desire to discriminate.

Texas next attempts to justify Section 21.031 by asserting that any decrease in the quality of education for citizens and legal aliens would not be offset by a significant gain.[32] This is so, argues Texas, because current immigration department practice is to concentrate on deporting illegal aliens who hold the highest paying jobs. Since a well-educated illegal alien is expected to earn more than an illegal alien totally deprived of any formal education, the well-educated illegal alien is more likely to be deported. Thus, Texas concludes, the State would not realize any significant gain by educating illegal aliens. But we find no basis for assuming that Texas seeks, or even constitutionally could seek, to confine the long-term benefits of the education it provides to either its border or the national border. Furthermore, if Texas did intend this end, it chose a grossly underinclusive means.

31. The State's use of a federal classification does not automatically validate Section 21.031. A state may incorporate a federal classification into its own laws; however, the state's use of the distinction must meet the appropriate equal protection standard, whether it be rational basis or strict scrutiny. *E.g.*, *Ambach*, *supra*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49; *Oyama v. California*, 332 U.S. 633, 644–64, 68 S.Ct. 269, 284–85, 92 L.Ed. 249 (1948) (Murphy, J., concurring). Hence, defendants cannot prove the rationality of Section 21.031 by merely referring to the differentiations contained in the federal immigration laws.

32. Brief for Appellant Texas at 28.

Another justification for Section 21.031 is asserted to rest on the fear that illegal aliens will contaminate citizen and legal alien children with communicable diseases—diseases that have been curtailed by immunization programs in the United States. The record does not reflect any evidence tending to prove that illegal aliens are more afflicted with these diseases than the general population. Assuming for the sake of analysis that illegal aliens are more afflicted with communicable diseases, we note that Texas apparently recognizes the more traditional means of accomplishing the containment of these diseases, for it states that schools may routinely require health certificates from students.[33] Nevertheless, Texas argues that even if schools require health certificates, illegal alien parents may pass communicable diseases through their children. By Texas' own admission, it is not merely the undocumented children's health that concerns the State, but their possible contact with other illegal aliens, such as their parents. We believe it clear that some citizen children who are eligible to attend Texas schools live with their illegal alien parents. Furthermore, because illegal aliens tend to reside near other Spanish-speaking residents, many eligible children reside nearby and have close contact with illegal aliens. Finally, even if Texas is concerned with the health of the undocumented students, there is no reason to believe that undocumented students in the Tyler Independent School District who can afford to pay tuition are less afflicted with communicable diseases than other undocumented students. We therefore conclude that if Texas seeks by the statute in question to control the health of the children attending its schools, it has done so in an irrational way.

33. *Id.* at 29.

The final justification tendered on this appeal is that denying undocumented children an education will lessen the incentive for aliens to illegally enter the United States and, specifically, the State of Texas. This goal, which is entirely consistent with federal immigration policy, may be commendable; however, the Constitution at a minimum requires that the means used by Texas be rationally related to that goal. We observe that the number of illegal aliens who bring their children to the United States is a small percentage of the total number of aliens illegally residing in the United States. Hence, Section 21.031 is aimed at only a small part of the total illegal immigration problem. We also note that Texas had declined to enact the measure most likely to result in lessening the incentive to illegally enter the United States, namely, a statute that would prohibit employers from employing illegal aliens. Of course, Texas is in no way obligated to enact this measure. Indeed, a state is not required to "choose between attacking every aspect of a problem or not attacking a problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970); *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). But the failure of Texas to enact the measure most likely to achieve its stated goal casts serious doubt on its exclusionary motive. This doubt, coupled with the district court's finding that Section 21.031 is an ineffectual means of discouraging illegal immigration, leads us to conclude that the statute is not rationally related to its asserted goal.

The defendants have interspersed various other justifications throughout their briefs. We also find them to be without merit.[34]

This Court is acutely aware that Texas is suffering the local effects of a national problem. When national immigration laws are not or cannot be enforced, it is the states, most particularly the border states, that bear the heaviest burden. This Court can readily understand the problems faced by a state such as Texas. However, this Court cannot suspend the operation of the Constitution to aid a state to solve its political and social problems.

We accordingly AFFIRM the district court's order enjoining defendants from applying Section 21.031 of the Texas Education Code and the tuition policy adopted by the Tyler Independent School District so as to deny free public education to any child in the Tyler Independent School District on the basis of his or her status as an undocumented Mexican alien.

34. The defendants suggest that school districts are unable to accurately estimate the number of illegal alien children who will attend their schools in the future, but no reason is given why it is more possible, if indeed it is, to accurately plan for eligible students. In any event, the defendants' lack of ability to plan for undocumented children does not justify their exclusion. The defendants also suggest that the excluded children have special educational needs that drain educational resources. But the district court found that the special needs of the undocumented children are indistinguishable from the needs of eligible students, and, moreover, that the federal government largely finances the cost of the special programs. *See* 458 F.Supp. at 589. Finally, the defendants intimate that illegal aliens do not pay their share of taxes, a suggestion the district court concluded to be unsupported, and thus do not deserve their share of governmental benefits. But a state may not limit a child's access to education merely because the child's parents pay relatively small amounts of income tax, or avoid some consumer taxes by giving their money to relatives outside the United States, or even actively violate the tax laws. *See Shapiro, supra*, 394 U.S. at 633, 89 S.Ct. at 1330 (stating that a state could not "reduce expenditures for education by barring indigent children from its schools").

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 78-3311

J. AND R. DOE, as Guardian Ad Litem for I. Doe, ET AL.,
Plaintiffs-Appellees,

versus

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, ET AL.,
Defendants-Appellants,

AND

STATE OF TEXAS,
Intervenor-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITIONS FOR REHEARING

(November 17, 1980)

Before DYER, FRANK M. JOHNSON and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

FRANK M. JOHNSON, JR.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

J. and R. DOE, ET AL.	)	
	)	
V.	)	**CIVIL ACTION NO.**
	)	**TY-77-261-CA**
JAMES PLYLER, ET AL.	)	

PERMANENT INJUNCTION

Based upon the findings of fact and conclusions of law incorporated in the Memorandum Opinion of this court this day filed, it is

ORDERED, ADJUDGED and DECREED that defendants James Plyler, Superintendent of the Tyler Independent School District, and Robert Dobbs, Charles Childers, Carl Ross, Martin Edwards, Vernon Goss, Michael Breedlove and Robert Randall, in their official capacities as members of the Board of Trustees of the Tyler Independent School District, their agents and successors in office, and all those acting in concert with them, and the State of Texas, be, and they are hereby, permanently restrained and enjoined from refusing to permit the named plaintiffs, or any other member of the class of undocumented school-aged children of Mexican origin now or hereafter residing within the boundaries of the Tyler Independent School District, to enroll in the public schools of such district; from requiring them to pay tuition fees; and from applying section 21.031 of the Texas Education Code and the policy adopted by the Board of Trustees of the Tyler Independent School District on July 21, 1977, so as in any way to deny free public education to any children in the Tyler Independent School District, solely on the basis of their status as undocumented Mexican aliens.

SIGNED and ENTERED this 14th day of September, 1978.

Wm. Wayne Justice

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

J. and R. DOE, ET AL.	)	
	)	CIVIL ACTION NO.
V.	)	TY-77-261-CA
	)	
JAMES PLYLER, ET AL.	)	

MEMORANDUM OPINION

Procedural History

This civil action began in September, 1977, when plaintiffs, a group of Mexican children who had entered the United States illegally and currently reside in Smith County, Texas,[1] sought injunctive and declaratory relief from this court by and through their parents, as next friends, against their exclusion from the public schools in the Tyler Independent School District ("Tyler I.S.D."). The defendant Board of Trustees of Tyler I.S.D. had refused to enroll any undocumented child,[2] absent a tuition fee of $1,000 per year, pursuant to section 21.031 of the Texas Education Code (Vernon Supp. 1976) ("section 21.031"). This

[1]The minor plaintiffs were represented by their parent or parents as guardians *ad litem*. Prior to the trial of this case on the merits, the court ordered that the action be maintained as a class action on behalf of all undocumented school-aged children of Mexican origin residing within the boundaries of the Tyler Independent School District.

[2]Because of the focus on documentation in both the challenged Texas statute and the Tyler I.S.D. policy, the excluded children will be referred to throughout this opinion as "undocumented children." The court will use the term "illegal aliens" to refer generally to those persons who reside in the United States in violation of the Immigration and Nationality Act. (STC) Although the term may have unpleasant connotations, this court has chosen it in the interests of economy and clarity of expression.

statute provides, in pertinent part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

Although section 21.031 had been enacted in 1975,[3] the Tyler I.S.D. continued to enroll undocumented

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[3]Prior to its amendment in 1975, Tex.Educ.Code §21.031 provided:

> (a) *All children without regard to color* over the age of six years and under the age of 18 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) *Every child in this state* over the age of six years and not over the age of 21 years on the first day of

children, free of charge, until the 1977-1978 school year, when they observed the increasing number of such children. In July, 1977, fearing that the Tyler I.S.D. would become a "haven" for illegal aliens, the Board of Trustees of the school district adopted the following policy, designed to implement the statute:

> September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission notwithstanding the fact that he may have been enumerated in the scholastic census of a different district or may have attended school elsewhere for a part of the year.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition *all persons* over six and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district. (Emphasis added.)

It is perhaps of more than mere historical interest that the State Attorney General ruled that alien children were entitled under this statute to attend public school regardless of whether they were legal or illegal residents. Att'y Gen. Op. H-586 (1975). The opinion further stated:

> We believe the words "all" and "every" as contained in section 21.031 . . . do not permit exceptions to be created by local school boards.
>
> Whether the Legislature itself may establish an exception for illegal aliens has not been decided by the higher courts. While we recognize that the United States Supreme Court could sustain such an exercise of legislative power, the existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. and the Fourteenth Amendment to the United States Constitution.

Att'y Gen. Op. H-586 (1975), citing Bolonos v. Kiley, 509 F.2d 1023 (2d Cir. 1975); Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W. 2d 635 (Tex. Civ. App.--El Paso 1972, writ. ref'd n.r.e.). *See infra* at 16-17.

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.
>
> A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

Acomplaint and motion for preliminary injunction were filed by plaintiffs on September 6, 1977. The complaint alleged that the Texas statute, as implemented by the Tyler I.S.D. policy, denied plaintiffs equal protection of the laws and, further, that the statute was preempted by the federal Immigration and Natinality Act, 8 U.S.C. §§ 1101 *et seq.*[4] On the same day, the court set a hearing on the application for preliminary injunction for September 9, and immediately notified the Attorney General of the State of Texas, the United States Attorney for the Eastern District of Texas, and the United States Department of Justice of the pendency and nature of the lawsuit.

At the September 9 hearing, the court granted the state's oral motion to intervene as a party defendant, made by and through the Attorney General. All parties, as well as the United States Department of Justice, were represented. Fearing disclosure of their identities,

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[4]The complaint also alleges causes of action based on denial of due process and discrimination on the basis of national origin. These claims appear to have dropped out by the time of trial on the merits, and they are not argued separately in plaintiffs' trial brief.

plaintiffs had filed their complaint under pseudonyms, and at the hearing moved for a protective order limiting the circumstances upon which, and the persons to whom, plaintiffs' true names might be revealed. The motion was granted and the order issued; however, the court advised the Department of Justice representatives that the order did not bind any officer of the United States who might desire to take action against plaintiffs and their parents for violations of the federal immigration laws.

The court thereupon proceeded to receive evidence, including testimony by the parents of the plaintiffs. Finding that plaintiffs had shown probability of success on the merits as to their equal protectio claim, and that the would suffer irreparable harm should interim relief be denied, the court granted the application for preliminary injunction. Findings of Fact and Conclusions of Law were entered on September 12, 1977. A final hearing was scheduled for December 12, 1977.

The final hearing continued for two days. The State of Texas, by the Attorney General, had filed an answer and participated fully as a defendant. The United States Department of Justice, pursuant to motion, was granted leave to participate as an *amicus curiae*. While the attorney representing the Government questioned several of the witnesses, he did not produce any independent witnesses. Plaintiffs offered into evidence the record of proceedings at the September hearing and, in addition, presented testimony of four expert witnesses. Plaintiffs' witnesses testified on the following topics: (1) the historical framework of illegal emigration from Mexico into the United States; (2) the general characteristics of illegal immigrants; (3) school financing in Texas; and (4) the educational needs of Mexican children. The defendant school board presented testimony from the Superintendent and Business Manager of the Tyler I.S.D. The State of Texas presented witnesses from the United States

Immigration and Naturalization Service, the Texas Education Agency, and the Houston Independent School District ("Houston I.S.D."), as well as two expert witnesses, who testified as to immigration and educational needs of Mexican students. In her opening statement, the Assistant Attorney General described the nature and scope of the state's evidence:

> Basically, what we will attempt to show or what we will show is the impact on the educational system, that it impacts to the detriment of the citizens, the legally admitted child, particularly in the border areas, and the areas in which you find large Mexican-American enclaves, which Tyler is not one of those areas. That's why you don't see the impact from Tyler like you see in the Houston I.S.D., Brownsville, San Antonio, Eagle Pass, Abilene--different places around the state where there are Mexican-American enclaves, mostly the border areas.

Record of Proceedings, Dec. 12, 16, 1977 ("Tr. 12/12"), at 163. At the conclusion of the hearing and after consultation with the attorneys, the court issued a briefing schedule.

Early in January, 1978, plaintiffs moved to amend their complaint to conform to the evidence and to add the Governor of Texas and the Commissioner of Education of the State of Texas as parties to the action. The motion was granted on January 5, 1978, and the amended complaint filed the same day. More than two months later, the State of Texas filed a motion for reconsideration and a motion to present additional evidence, based on the grounds that the Attorney General's Office represented neither the Governor of Texas nor the Commissioner of Education; that counsel for the state and the prospective witnesses had always assumed that the instant civil action would affect only the Tyler I.S.D. and not other school districts

throughout the state; and that the evidence offered at trial had been consciously limited by this understanding.

Immediately prior to the trial on the merits, plaintiffs filed a brief which included references to the evidence they would offer at trial. The United States filed a post-trial brief, including substantial references to the evidence, in which it took the position that defendants' statute and policy violated the fourteenth amendment guarantee of equal protection of the laws, but were not invalid under the federal preemption doctrine. The United States had already submitted to the court and the parties copies of the Preliminary Report of the Domestic Council Committee on Illegal Aliens, December 1976 ("Preliminary Report"). The State of Texas chose to submit its briefs filed in a similar challenge to section 21.031, *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex. Civ. App.--Austin 1977, writ ref'd n.r.e.).

The *Hernandez* case had been brought more or less concurrently with the instant action by a group of undocumented children living within the Houston I.S.D. The State Board of Education denied relief, and its order was affirmed by the District Court of Travis County, 126th Judicial District of Texas, which granted summary judgment. Additional defendants in the state court action were the Texas Education Agency and the State of Texas. Subsequent to this court's entry of the preliminary injunction in the instant case, the Court of Civil Apeals for the Third Supreme Judicial District of the State of Texas affirmed the judgment of the district court and upheld the constitutionality of section 21.031. *Hernandez v. Houston Independent School District, supra.* The Supreme Court of Texas refused an application for the writ of error, with the notation, "No reversible error." Defendants have not argued that the *Hernandez* decision is in any way binding on this court in the case before the court.

Findings of Fact

The minor plaintiffs herein are all school-aged children, born in the Republic of Mexico, who reside with their parents within the boundaries of the Tyler I.S.D. None of the minor plaintiffs possesses documentation that he or she is legally in the United States or is in the process of securing such documentation. There are probably thirty to forty undocumented school-aged children residing in the Tyler I.S.D. in addition to the named plaintiffs.

Each minor plaintiff is represented in this civil action by his or her parents, as next friends. All of the parents in question are aliens of Mexican origin, who illegally entered and remained in the United States, and who reside within the boundaries of the Tyler I.S.D. The families represented in this civil action have lived in the city of Tyler for a period of three to thirteen years. Each such family includes at least one child, not of school age, who is a citizen of the United States by virtue of his or her birth in the United States.

The Tyler I.S.D. constitutes a public school district, which receives some federal funding in addition to state and local funds. James Plyler is the Superintendent of the Tyler I.S.D. The managing board of the District is the Board of Trustees.

Section 21.031 of the Texas Education Code (Vernon Supp. 1976), effective September 1, 1975, limits the benefit of the state's "Available School Fund" to children between the ages of five and twenty-one, who are citizens of the United States or legally admitted aliens; it limits admission to the public free schools in any district to such citizens or lawfully resident children whose parents or guardians reside within the district. (Section 21.031 is set forth in the procedureal history of this case, *supra* at 1.)

On July 21, 1977, acting in furtherance of and pursuant to section 21.031, the Tyler I.S.D. Board of

Trustees promulgated a policy concerning the financing and control of education for illegally admitted aliens. This policy, set forth in full, *supra* at 2, permits the enrollment of illegal alien children only upon payment of tuition. The policy defines illegal alien children as those who neither possess documentation that they are legally within the Unitd States nor are in the process of successfully securing such documentation.[5]

The Tyler policy has been implemented by defendants and their agents since the beginning of the 1977 school year. In accordance with that policy and based upon an educational expense analysis conducted by the Administrative Office of the Tyler I.S.D., an amount of tuition of $1,000.00 per year has been set as a fee for each child residing within the Tyler I.S.D. who is neither a citizen of the United States, a legally admitted alien, nor an illegal alien who has begun processing his papers for legal admission with the United States Immigration Service. The sum of $1,000.00, representing the approximate proportional cost of educating a single child in the Tyler I.S.D., was arrived at by dividing the district's annual operating budget, $18.5 million, by the approximate number of enrolled students, 16,000.

All of the parents of the plaintiffs were informed by school officials that their children could not attend the school without either producing the required documents or paying the $1,000 tuition fee. There is no reasonable expectation that any of the named plaintiffs or their parents can obtain the required documents

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[5]*See* note 2 *supra.*

from the United States Immigration and Naturalization Service.[6]

Except for the existence of section 21.031 and the Tyler I.S.D. policy, all named plaintiffs would be eligible for admission to the Tyler I.S.D. on a tuition-free basis and would currently be enrolled in the Tyler public schools. All minor plaintiffs, with the exception of two, attended the Tyler I.S.D. schools in the school year 1976-1977. The two excepted children attended the Tyler I.S.D. Head Start Program in the summer of 1977, preparatory to entering the first grade. Because of their poverty, none of the parents of the named plaintiffs can afford to pay the tuition fee of $1,000 or any other significant sum. None of the minor plaintiffs possesses independent resources to pay such tuition. Prior to the issuance of the preliminary injunction in this civil action, none of the named plaintiffs was attending school in the Tyler I.S.D., except for J.D.Doe. Two undocumented children are currently attending the Tyler public schools as tuition-paying students.

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[6]The basis for this conclusion is that none of the minor plaintiffs nor their parents appears to satisfy any of the preferences which govern eligibility for permanent resident status. As explained by William J. Chambers, District Director of the Dallas District of the United States Immigration and Naturalization Service, a witness for the State of Texas at the preliminary injunction hearing, eligibility derives basically from two sources: a family relationship with either a United States citizen or a permanent resident alien, or possession of certain occupation skills. Specifically, a United States citizen or lawful permanent resident can petition for immigration of a parent, spouse, child or sibling. A person must be 21 years of age in order to petition on behalf of a parent or sibling. Prerequisites for occupational preferences are either specialized professional skills or any skills of which teh United States is at a given time experiencing a shortage. *See* 8 U.S.C.A. §§1151(b) and 1153(a)(1)-(a)(6).

Were the preliminary injunction issued by this court not in effect, none of the named plaintifs, with the exception of those children identified as Doe, would currently be attending any school. The Doe children, except for J.D. Doe, were enrolled in a Catholic school after being rejected for admission to the Tyler I.S.D. on a tuition-free basis. Doe works for the Catholic school in Tyler on weekends, in exchange for his children's attendance.

The parents of plaintiffs Doe are owners of real and personal property in the Tyler I.S.D. All other parents of minor plaintiffs rent housing within the Tyler I.S.D. At least one parent of those children identified as Doe, Roe, and Loe is employed, and federal income and Social Security taxes are withheld from his or her paycheck. Three of the four families represented had purchased at least one automobile and could produce registration and title documentation.

The primary purpose of section 21.031, as characterized by the State of Texas, is to employ public educational funds to provide education to U.S. citizens and legally admitted aliens.[7] The Tyler I.S.D. policy was implemented pursuant to the state statute, in order to prevent the potential drain on local educational funds should Tyler become a haven for illegal aliens. The dourt finds, however, that neither the statute nor the policy has either the purpose or effect of keeping illegal aliens out of the State of Texas.

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[7]The state court's conclusions regarding the purpose of §21.031 in effect restate the state's position as expressed in its Brief in Opposition to Application for Writ of Error. For an extensive discussion of this purpose, see *infra*.

Increasing numbers of Mexican nationals have emigrated into the United States in recent years. A large portion of these immigrants have settled in Texas, resulting in significant increases in public school enrollment. For example, Defendants' Exhibits 2 and 3 show that the number of Mexican alien students enrolled rose from 44,799 in 1975-76 to 51.348 in 1976-77, increasing the statewide percentage of Mexican alien children in the public schools from 1.59 to 1.8 percent. The great majority of such children are assumed to be legal residents. Tr. 1/16 at 184. This wave of migration has presented grave problems for the public schools in Texas. The mere increase in population, without regard to any special characteristics of Mexican immigrant children as a class, has meant that existing school facilities in the impacted areas are physically inadequate. The failure of some school districts to build new facilities or augment existing ones has necessarily resulted in overcrowding of school buildings and classrooms.

The State of Texas is deeply concerned with the growing impact of Mexican migration on its public schools. Defendants' Exhibit 6, the Mexican Immigrant-Alien Student Study, 1975-76, chronicles the development of this concern, which prompted a resolution of the State Board of Education in July, 1975, recognizing the need for further study of the problem. Subsequently, an in-depth investigation of the problem in the districts bordering the Republic of Mexico was conducted by the Region One Education Service Center, in Edinburg, Texas. The Texas Education Agency effected a survey of the problem in the remainder of the state. These studies, introduced into evidence by the state, reveal that overcrowding has reached serious, indeed "atrocious", proportions in the border areas and in metropolitan districts. The Region One Study identifies further characteristics, peculiar to Mexican

immigrants, exacerbating the problem: the children generally speak little or no English and are badly educated and overage for their grade level. Special bilingual education for these children is indispensable, yet it is difficult to find qualified personnel for such programs, which also require a disproportionate amount of teacher attention. Additionally, these children tend to come from poor families. Their residence in school district thus does little to offset the additional cost by adding to the tax base.

The state's witnesses, Thomas Anderson (a representative of the Texas Education Agency), John Eaton (Associate Superintendent of Houston I.S.D.), and Jim Bob Hensley (author of Defendant's Exhibit 6), expressed the opinion that the major justification for section 21.031 was its partial solution to the educational difficulties caused by migration from Mexico in general. No convincing testimony was presented, however, that singled out undocumented children as particularly problematic.[8] The characteristics of legally admitted, Mexican-born children, as a class, are very similar, if not identical, to those of undocumented Mexican-born children. Typical of the undifferentiated analysis of the problem is the testimony of Jim Bob Hensley that a "national policy had permitted a flow of immigrants into the country, and a local school district was being penalized for that," Tr. 12/12 at 302, and of John Eaton that "it would impact, if we had more Hispanic children coming in. . ." Tr. 12/12 at 259.

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[8]In her opening statement, counsel for the state argued that "(t)here are cost factors which fall outside the average daily attendance costs in terms of lost textbooks, problems you would not have with the average student." Tr. 12/12 at 164. However not a shred of evidence was offered to substantiate the suggestion that undocumented children tend to lose or "remove" textbooks at a higher rate than their citizen or lawfully resident schoolmates.

The evidence discloses that the exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level; but the savings are unpredictable both in amount and distribution. Approximately twenty-five percent of educational expenditures in Texas are in fixed cost areas, *i.e.*, administrative, maintenance, and operation costs, which are not diminished by moderate declines in student enrollment. The largest item in variable costs is teacher salaries, which require substantial and concentrated decline in enrollment before any economies result. Generally, a decrease of twenty to thirty students at one time, in a given grade and in a given school, is required in order to justify the dismissal of one teacher. Even then, systems of tenure and seniority operate to minimize savings, since the first teachers to be dismissed are ordinarily those with the lowest salaries. Hence, the proportional cost (operating budget divided by enrollment) is a very inaccruate indicator of the incremental expense of educating additional students.

The connection between the "economy measure" of excluding undocumented children from the benefits of the Available School Fund and increasing educational quality for the remaining students was shown to be unreliable, and often perverse in operation. Educational funds in Texas come from state, local and federal sources. A local distict's allotment from state funds depends, in part, on its average daily attendance ("ADA"). Prior to the enactment of section 21.031 in 1975, a district could include undocumented children in its ADA and receive state funds accordingly. Under section 21.031, however, a district is required to exclude undocumented children from its ADA, decreasing the amount of state funds it receives. Meanwhile, the diminished enrollment, by reason of the factors described above, is unlikely to have resulted in any savings to the local district. The school district is then

forced to choose between increasing its own contribution, so as to maintain the current level of expenditures, or cutting back on its programs. Although the state will have saved money, it will not necessarily have improved the quality of education.

The federal government funds the free breakfast, lunch and clothing programs for which many children of Mexican origin are eligible, whether or not they are legal residents. The largest single source of funds for bilingual education is the federal government, which pays for approximately forty-five percent of the cost. Approximately eighty percent of the remainder is paid from local funds; twenty percent is paid by the state.

In the Tyler I.S.D., the impact of the undocumented children on the school system (at most sixty out of an enrollment of 16,000 in 1977) has been negligible, as were the savings to the district after exclusion of the children. Dr. James Plyler, Superintendent of Tyler I.S.D., testified that the admission of undocumented children would raise the number of children of limited English-speaking ability to twenty-two kindergarten students and twenty first-grade students, triggering the implementation of a formal bilingual education program under state law. The district is already, from its own sense of educational priorities, employing three bilingual teachers. Implementation of the statutory program would require additional teachers and compliance with certain administrative procedures.

In 1976 the Immigration and Naturalization Service ("I.N.S.") estimated that approximately four to five thousand undocumented children resided in the Houston I.S.D.,[9] which had a total enrollment of 206,998 students. The total proportional cost of educating a needy Mexican child, whether a legal or an illegal

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[9]The court finds only that the estimate was made, not that it is reliable.

resident, was $1,740.41 (including free lunch, free breakfast, free clothing, and bilingual education, in addition to the regular curriculum); this is $400 to $500 more than the proportional cost of educating what Associate Superintendent Eaton designated as the "average pupil".

The predictable effects of depriving an undocumented child of an education are clear and undisputed. Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, these children, without an education, will become permanently locked into the lowest socio-economic class. Furthermore, witnesses from both sides testified that the illegal alien of today may well be the legal alien of tomorrow. According to Dr. Gilbet Cardenas, plaintiffs' expert on migration, the majority (fifty to sixty percent) of current legal alien workers were formerly illegal aliens. Roland Heston, District Director of the Houston District of I.N.S., a witness for the state, confirmed that undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident. The court also takes judicial notice of various presidential and legislative proposals that would legalize the status of many currently undocumented children. *See, e.g.*, Office of the White House Press Secretary, President's Message to the Congress on Undocumented Aliens at 5 (Aug. 4, 1977).

Generalizations About Illegal Aliens

Testimony and exhibits received into evidence during the trial of this case attempted to describe the alien population illegally in Texas. There is little dispute about most such generalizations, but they are made in the face of what the Domestic Council's Preliminary Report calls a "dramatic lack of reliable information" (Preliminary Report at 235); thus this court does not desire to vest them with the certainty and authority

ordinarily associated with findings of fact. However, the following tentative conclusions revealed by various studies have been of interest to the court in its consideration of the case.

Estimates of the number of illegal Mexican aliens in the United States vary widely and are inherently unreliable by reason of the clandestine nature of the illegal population. Marion Houstoun, one of the plaintiffs' migration experts and co-author of the North-Houstoun Study,[10] estimated that there are 2.7 million Mexicans illegally in the United States and 675,000 in Texas. This was thought to be a conservative estimate by other witnesses questioned about the matter. The I.N.S. no longer makes estimates.

The impetus for illegal migration is predominantly economic, and consequently its principal impact in the United States is on the labor market. The vast majority of illegal Mexican immigrants are young adult males (averaging around thirty years old) seeking employment opportunities in this country.[11] Indeed, the great majority of the illegal alien class is not of concern in this case, since these workers are either single or leave their families in Mexico and come to the United States for short periods of time. Much of the earnings of

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[10]The North-Houstoun Study involved the questioning of 793 apprehended illegal aliens of at least 16 years of age who had worked in the United States for wages for at least two weeks, and was designed to provide information about the characteristics of illegal aliens. The inherent bias of this study is described in the Preliminary Report at 126ff.

[11]The conclusion that employment is the main incentive for illegal migration from Mexico has been consistently agreed upon. The undisputed testimony to this effect at trial is supported by every source this court has consulted. *See, e.g.*, Preliminary Report at 89, 152 and passim; Miller, *Immigration and National Law*, 1977 Annual Survey of American Law 205; Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 Hastings Const. L.Q. 295 (1977).

these illegal immigrants is sent to their dependents in Mexico. This case mainly concerns a very small subclass of illegal aliens with very different characteristics, that is, entire families who have migrated illegally and--for all practical purposes--permanently to the United States.

A few available studies tend to refute--although not conclusively--allegations that illegal aliens, as a class, produce a substantial drain on public services. Two reasons are advanced for this phenomenon: (1) they are unwilling to risk exposure and hence shy away from any institutional involvement; and (2) there is no welfare tradition in Mexico to which they may have become accustomed. Conclusions about the tax contributions of illegal aliens in general are necessarily more intuitive than scientific. There is no state income tax in Texas, but it is impossible to live in a state such as Texas without paying consumer taxes, and nearly impossible to work without paying Social Security taxes. Normally, families with many children do not pay large amounts of federal income tax, regardless of the legality of their residence in the country. However, Social Security taxes are the major source of tax revenues the federal government collects from the poor in general. Preliminary Report at 162.

Conclusions of Law

Plaintiffs urge that section 21.031, implemented by the Tyler I.S.D.'s policy of charging undocumented children a tuition fee, denies them their right to equal protection of the laws, as guaranteed by the fourteenth amendment. Plaintiffs also argue that the challenged statute and policy should be subjected to close judicial scrutiny because: (1) plaintiffs are being absolutely deprived of any education; and (2) they are a politically powerless minority, forced to suffer because of the misdeeds of parents over whom they have no control. The fiscal justifications advanced by Tyler I.S.D. in

support of their policy, plaintiffs contend, are insufficiently compelling to justify the discrimination imposed.

Defendants counter with the argument that illegal aliens are not entitled to equal protection of the laws, but that even if they were, the challenged statute and policy are merely "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," thereby requiring only relaxed judicial scrutiny. *Dandridge v. Williams*, 397 U.S. 471, 484 (1970). Defendants also maintain that their decision to spend public funds to provide high quality education for United States citizens and lawful residents, instead of sharing it with people who have no right to be in the state at all, should be subjected to, and easily satisfies the long-established rational basis test. *See, e.g., Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

Neither the language nor the logic of the fourteenth amendment supports the proposition that the guarantee of equal protection of the laws does not extend to illegal aliens. The United States Supreme Court has indicated that illegal aliens are entitled to the protection of the due process clause. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976)(dictum); *Wong Wing v. United States*, 163 U.S. 228 (1896). The structure of section one of the fourteenth amendment does not indicate a different result for the guarantee of equal protection of the laws:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws. (Emphasis added.)

While due process is afforded to "any person," equal protection extends only to "any person within its jurisdiction." Yet this apparent narrowing of the equal

protection guarantee, by virtue of its very specificity, should not be read to exclude a class of persons that fits within the narrowed language. People who have entered the United States, by whatever means, are "within its jurisdiction" in that they are within the territory of the United States and subject to its laws. Joining Judge Friendly in *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975), this court "can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States (citations omitted) and even to aliens whose presence here is illegal." *Accord, Holley v. Lavine*, 529 F.2d 1294 (2d Cir.), *cert. denied*, 426 U.S. 954 (1976); *United States v. Barbera*, 514 F.2d 924 926 n. 3 (2d Cir. 1975). *Cf. Williams v. Williams*, 328 F. Supp. 1380 (D.V.I. 1971) (illegal aliens entitled to access to divorce courts); *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936) (illegal alien allowed to sue to recover for personal injuries in negligence action); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App.--El Paso 1972, writ. ref'd n.r.e.) (illegal alien not barred from workmen's compensation benefits). *But see Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).[12]

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[12]Defendants make much of the fact that the Supreme Court has never held that illegal aliens are entitled to equal protection of the laws, while it has accorded them due process, and that, in general, authority for such an inference is undeniably scarce. This dearth of authority, however, seems amply accounted for by the predictable unwillingness of illegal aliens fearing deportation to expose themselves, indeed to advertise the fact of their illegality by making it the focus of a lawsuit. The cases protecting the due process rights of illegal aliens generally involve the procedural adequacy of deportation proceedings, which are already underway. *See, e.g.*, Wong Yang v. McCraw, 339 U.S. 33 (1950); Wong Wing v. United States, 163 U.S. 228 (1896).

The conclusion that illegal aliens are entitled to equal protection of the laws in no way means, however, that illegal aliens are entitled to precisely the same treatment afforded U. S. citizens and lawfully resident aliens. As Mr. Justice Jackson described the "salutary doctrine" of the equal protection clause, "cities, states and Federal Government must exercise their powers so as not to discriminate between their inhabitants, except upon some reasonable differentiation fairly related to the object of regulation." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (concurring opinion). Viewed in this light, as a guarantee only that *unreasonable, arbitrary* lines will not be drawn, the content of the right to equal protection of the laws, not its application *vel non*, becomes the salient question, and one that must be assessed with respect to each individual case.

The fairness of the legislative classification contained in the challenged statute and policy must be measured within the framework of the well established two-tiered test. If the challenged law threatens a fundamental right or creates a suspect classification, the court must subject the state's interests served by the law to strict scrutiny. In such a case, the law will be upheld only if it is precisely tailored to further a compelling government interest. *Shapiro v. Thomspon*, 394 U.S. 618, 638 (1969). Absent a fundamental right or suspect classification, a law need only be supported by a rational basis. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973).[18]

[18]Commentators have suggested the emergence of a sliding scale or intermediate scrutiny, *see, e.g.*, Gunther, *The Supreme Court 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); and various Supreme Court decisions indicate some flexibility in the test. *See* Craig v. Boren, 429 U.S. 190 (1977); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). A majority of the Supreme Court, however, has never explicitly sanctioned such an approach. *But see* San Antonio I.S.D. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

As implemented by the Tyler I.S.D., section 21.031 has created a distinct class of poor, undocumented children who are absolutely deprived of any education whatsoever. While the level of scrutiny appropriate for reviewing this kind of total deprivation of education has never been explicitly identified by the Supreme Court, several elements in this case invite a close examination of section 21.031.

The first of these elements lies in the benefit denied, education. In *San Antonio Independent School District v. Rodriguez* the Court said that "(e)ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35. Yet the holding of *Rodriguez* was explicitly and repeatedly limited to the sort of relative deprivation of education challenged in the case itself. Under the Texas school financing scheme, children in property-poor school districts attended schools with access to fewer funds than those in property-rich school district ; but no children were prevented from attending school altogether. Indeed, the opinion is conspicuous in its efforts not to foreclose strict scrutiny in response to constitutional challenges to absolute deprivation of educational opportunity:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people--definable in terms of their inability to pay the prescribed sum--who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

411 U.S. at 25 n. 60.

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunites to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 37.[14] *See also Mills v. Board of Education*, 348 F. Supp. 866, 876 (D.D.C. 1972).

An additional indication that heightened scrutiny may be appropriate arises from the contention that the challenged policy of charging tuition to undocumented

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[14]It is no answer to the *Rodriguez* dictum that the ability of illegal alien children to exercise free speech and participate in the political process is of no concern to the State of Texas. These children, and many more like them, are here and are likely to remain here. (See Findings of Fact, *supra* at 12.) The federal government has chosen, whether by act or omission, not to deport them. Many of them have younger siblings who are American citizens and who may someday be the means of legalizing the presence of the whole family. Developments in federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. As the Supreme Court has recognized, the benefits of education are not reserved to those whose productive utilization of them is a certainty: "(a)lthough an alien may be barred from full involvement in the political arena, he may play a role--perhaps even a leadership role in other areas of import to the community." Nyquist v. Mauclet, 432 U.S. 1, 12 (1977).

children constitutes discrimination on the basis of wealth.[15] Relatively wealthy undocumented children are able to attend school despite the Tyler I.S.D. policy--two such children are actually doing so--, while poor undocumented children are excluded. In *Rodriguez*, the Court distinguished prior cases in which the class discriminated against "shared two distinguising characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20. Such absolute deprivations imposed only on poor people have long been considered deserving of judicial solicitude, *see, e.g., Griffin v. Illinois*, 351 U.S. 12 (1958), and such a tuition requirement was explicitly distinguished in *Rodriguez* when the Court declared that the existence of "a clearly defined class of 'poor' people" would "present a far more compelling set of circumstances for judicial assistance" than the San Antonio case itself. 411 U.S. at 24 n. 60. Similarly, in *Shapiro v. Thompson*, 394 U.S. at 633,

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[15]It is not completely clear whether the statute itself, as opposed to the Tyler policy, contemplates admitting undocumented children to public schools upon payment of tuition. Subsection (a) of §21.031 clearly excludes them from the benefits of the Available School Fund, which means the school they attend could not legally draw state funds for them. Subsection (b) of the statute appears to permit only citizens or legally admitted aliens to attend the public schools at all. Subsection (c) of §21.031, however, directs the local boards of trustees to admit citizens and legally admitted aliens to the public schools *free of tuition*, which might imply that undocumented children might be admitted on the payment of tuition. The only two school districts which, to the court's knowledge, have made a policy of implementing §21.031, Houston I.S.D., and Tyler I.S.D, have read the statute to permit enrollment of undocumented children who pay tuition, and counsel for the state appears to have made the same assumption. The state's focus on financial restrictions as the major justification for its law supports the conclusion that the statute contemplates admitting undocumented children who pay tuition.

the Court observed that a state "could not, for example, reduce expenditures for education by barring indigent children from its schools."

Furthermore, although it is not inaccurate to characterize section 21.031 as "state regulation in the social and economic field," *Dandridge v. Williams*, 397 U.S. at 484, as defendants urge, this case does not follow the pattern of those in which such a characterization has triggered relaxed rather than heightened review. In *Dandridge*, as in *Rodriguez*, the deprivation was relative rather than absolute, *i.e.*, some families received less aid in proportion to the number of children than others, but no discrete class of needy families was completely cut off from benefits. *See also Jefferson v. Hackney*, 406 U.S. 535 (1972).

A more exacting scrutiny of the Texas law also appears warranted when consideration is given to the decisions of the Supreme Court refusing to penalize and stigmatize children who are not in a position to prevent the wrongful acts of their parents. As Mr. Justice Powell said of laws disfavoring illegitimate children:

> (V)isiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the. . .child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing.

Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175 (1972) (footnote omitted). *See also St. Ann. v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) (invalidating school board's decision to suspend two children from school because their mother had assaulted an assistant principal, on ground that "(f)reedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme of justice."). While the undocumented minor plaintiffs are of course legally

culpable and subject to deportation,[16] they can hardly be held morally responsible for their presence here. Many of them were hardly more than infants when they arrived in the United States, nor did they participate in their parents' decision to emigrate; consequently they deserve no additional burdens or penalties.

Finally, plaintiffs, together with the United States as *amicus curiae*, urge that strict scrutiny should be applied because illegal aliens are basically a suspect class. Illegal aliens as a class, they urge, meet all the "traditional indicia of suspectness," in that,

> (t)he class is. . .saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

411 U.S. at 28.

Plaintiffs and *amicus* further maintain that illegal aliens are a suspect class because they are a sub-class of a suspect class, that is, of aliens in general. *Nyquist v. Mauclet*, 432 U.S. 1 (1977). However, it is clear that illegal aliens are not a sub-class of the class of aliens granted suspect status in *Graham v. Richardson*, 403 U.S. 365 (1971), and its progeny, for the Supreme Court in *Graham* referred specifically to the class of lawfully admitted aliens. Illegal aliens are, therefore, not a sub-class but rather a separate class, for which suspect status must be independently established.

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[16] 8 U.S.C.A. §§1325 and 1326, making illegal entry a misdemeanor for the firs commission and a felony for subsequent commissions, and making reentry of a deported alien a felony, do not distinguish between children and adults.

The State of Texas makes the provocative argument that it is the implicit holding of *DeCanas v. Bica*, 424 U.S. 351 (1976), that illegal aliens are not a suspect class. At issue in *DeCanas* was a California statute (Cal. Lab. Code §2805(a)) prohibiting the knowing employment of illegal aliens when lawfully resident workers would be disadvantaged.[17] The Supreme Court held that the law was not unconstitutional as a regulation of immigration, *see infra* at 36. The State of Texas contends that the California law disfavors illegal aliens and would necessarily have fallen under an equal protection analysis if illegal aliens had been regarded as a suspect class.

While the *DeCanas* opinion makes no mention of the equal portectin clause, the case was, in the abstract at least, susceptible to equal protection analysis. It does not appear, however, that any of the parties in *DeCanas* had standing to raise the equal protection question. Employers of illegal aliens were defendants in a suit brought by displaced *legal* alien workers to enforce the California law; it was the defendant employers who raised the federal preemption argument as a defense. Nevertheless, even if *DeCanas* had been upheld squarely against an equal protection challenge, this court feels that the case is substantially distinguishable on both the general question of the constitutionality of section 21.031 and the particular question of whether illegal aliens are a suspect class, *see infra*.

It seems clear that illegal aliens do not constitute a suspect class when they are in violation of state laws or

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[17]The statute provides, in pertinent part:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

regulations whose underlying purpose is in conformity with a federal objective or end. It is equally apparent, however, that in certain conditions and circumstances unrelated to the federal bases for their exclusion, illegal aliens, as a class, are susceptible to and have suffered much abuse and exploitation. A reconciliation of this conflict might be accomplished by recognizing illegal aliens as a suspect class--and requiring strict scrutiny--in cases where the state acts completely independently of the federal exclusionary purposes and, indeed, accepts the presence of illegal aliens, but then subjects them to gratuitously abusive laws that render them an underclass. The law in *DeCanas* and section 21.031 clearly part company under this analysis, as an inquiry into the effect and purposes of federal law reveals.

The cornerstone of federal immigration law remains the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act, 8 U.S.C. §§1101 *et seq.* Insofar as the instant case is concerned, the most salient features of the Act are: limitation of immigration into the United States; exclusion of those aliens who are not granted visas; and assignment of criminality to foreigners who enter without permission. The McCarren-Walter Act identifies two main principles according to which the admission of prospective immigrants must be defined. First, the Act evidences a strong concern for family reunification, making a relationship with a United States citizen or permanent resident the primary means of obtaining a visa. Second, the Act contains a labor certification program "designed to protect the United States labor market from the influx of both skilled and unskilled foreign labor." Note, *Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion*, 43 Geo. Wash. L. Rev. 914 (1975).

Section 212(a)(14) of the McCarran-Walter Act originally placed the burden of certification on the Secretary of Labor. Aliens were not ineligible for admis-

sion until the Secretary so certified.[18] In 1965, partly in response to requests from organized labor, *see* Note, 43 Geo. Wash. L. Rev. at 915 n. 9, Congress amended the provision to strengthen its protection of the domestic labor force. As amended, the labor certification program exludes an alien worker[19] *unless* the Secretary of Labor makes certain determinations. Specifically, the section provides:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

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[18]Section 212(a)(14) of the McCarran-Walter Act provided, in pertinent part:

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United Sates:
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> (14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission into the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed.

[19]Not all aliens are subject to §212(a)(14). The exclusions from its provision, which derive from the priority Congress has placed on certain family relationships, are specified in the last part of the section.

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(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to non-preference immigrant aliens described in section 1153(a) (8) of this title . . .

8 U.S.C. §1182(a)(14)(1970).

Since illegal aliens come to the United States to find employment, it is reasonable to assume that they would not emigrate if they did not expect to find employment. The prohibition of employment of illegal aliens is an important feature of major federal proposals to upgrade the effectiveness of congressional limits on immigration, indicating a consensus of opinion that such measures are effective. *See also* Preliminary Report at 241. The Supreme Court has repeatedly recognized the same phenomenon: "The assertion of an authority to deny to aliens the opportunity of earning a

livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in the ordinary cases they cannot live where they cannot work." *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 416 (1948), quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915).

A state law prohibiting employment of illegal aliens may be entirely consistent with the federal scheme. The improved federal labor certification program was enacted, in the words of its proponents, to "protect...the American economy and the wages and working conditions of American labor." 111 Cong. Rec. 24463 (1965) *quoted in* Note, *Alien Labor Certification*, 60 Minn. L. Rev. 1034, 1034 n. 3 (1975). The California legislature's prohibition of the knowing employment of illegal aliens manifestly represents a local effort to deal with a particularly aggravated version of the dangers Congress has recognized and made one of its central concerns. Thus, although the *DeCanas* Court did not base its decision on this point, the state scheme, perhaps unwittingly, serves the basic purposes of the Immigration and Nationality Act, for section 2805(a) promotes not only the specific federal design of protecting the domestic labor market, but also the general function of exclusion.

By contrast, the Texas statute at issue in the instant case is neither intended to, nor does it in fact, implement any express or apparent federal objective. The State does not attempt to justify section 21.031 as an effort to exclude or to discourage those aliens whom Congress has chosen to exclude, nor could such a justification be taken seriously. Charging tuition to undocumented children constitutes a luidicrously ineffectual attempt to stem the tide of illegal immigration, when compared with the California statute [20] or the proposed federal

[20]It is also interesting to compare another California law mentioned by the United States in its Post-trial Brief, under which the state

equivalents. While the Texas legislature is in no way obligated to prohibit the employment of illegal aliens, its failure to do so is glaring and undermines any earnest attempt to argue an exclusionary motivation.[21]

In short, by its own admissions and the logic of its legislative scheme, the State of Texas has been content to leave to the federal government the task of excluding illegal immigrants and thus protecting the domestic labor market.[22] This virtually ensures what is undisputably the case in Texas: the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural

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reimburses a local district for the cost of educating an undocumented child, but requires local officials to forward a list of names of such children to the I.N.S. The court expresses no opinion as to the constitutionality of such a law, but mentions it only as a more effective way of discouraging illegal immigration through the public schools than charging tuition.

[21]Bills prohibiting the employment of illegal aliens under various circumstances were introduced during the 1977 session of the Texas legislature, but none was reported out of committee. *See, e.g.*, House Bills 174, 374 & 816.

[22]There are two sides to the effect of illegal workers on a local labor market, and it is simply a question of political and economic preference whether the net effect is found to be good or bad. According to the Preliminary Report, and stated very simplistically, both illegal and legal immigration of workers increases the gross national product. If illegal workers can be hired at lower wages and in worse working conditions, profits rise and prices fall, resulting in small economic gains for many people. The argument against this view, of course, considers the displacement of low-income lawful resident workers and the dangers of an exploitative employment relationship. *See* Preliminary Report at 155ff. The federal government and California prefer to protect resident workers from displacement.

citizens and business organizations may wish to subject them. In such a context, the state's exclusion of undocumented children from its public schools, or, alternatively, its attempts to exact from such children a much larger sum of money than is in fact required to absorb them into an ongoing school system, may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed. In the instant civil action, however, none of four indications that strict scrutiny is the appropriate level of review, as discussed above, exactly corresponds with any case in which the Supreme Court has applied such scrutiny. In any case, since it appears that defendants have not demonstrated a rational basis for the state law or the local school policy, it is not necessary to resolve finally the difficult conceptual problems posed by the two-tiered test.

Defendants seek to justify section 21.031 by arguing that, in view of the limited revenues available within the state which can be used to achieve the social goal of educating Texas children, "(t)he legislature has determined that those funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas." Brief of Defendant Tyler I.S.D. at 16.[23] Defendants attempt by their proof at trial to rationalize this decision by cataloguing a number of characteristics and special educational needs that make illegal alien children especially burdensome to educate. Notwithstanding, careful consideration of the evidence and applicable law compels the conclusion that neither of these approaches provides a rational basis for the state's singling out of undocumented children to bear the brunt of whatever financial problems the Texas public schools may have.

[23]An identical statement is found in the state's Brief in Opposition to Application for Writ of Error submitted to the Supreme Court in *Hernandez, supra*, at p.9.

It is not sufficient justification that a law saves money. This approach to the rationality test is well illustrated in the case of *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), in which the Supreme Court struck down as irrational section 3(e) of the Food Stamp Act of 1964, which excluded from participation in the food stamp program any household containing an individual unrelated to any other member of the household. Clearly this exclusion would have saved the federal government money; a program affording benefits to all households cost more than a program affording benefits only to some. Despite this factor, the savings to the Government was not considered by the Court as a sufficient justification, absent some rational connection between the purposes of the Food Stamp Act--the stimulation of the agricultural economy by the purchasing of farm surplusses--, the Court held that the relationships among persons in a household were irrelevant to that purpose and did not provide a rational principle of exclusion. The legislative history of section 3(e) revealed that the provision "was intended to prevent so-called 'hippies' and 'hipie communes' from participating in the food stamp program." 413 U.S. at 534. Apparently, Congress chose not to subsidize living arrangements and lifestyles of a certain variety. But, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm[24] a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*[25]

[24]It must be remembered that the "harm" referred to in *Moreno* was denial of benefits, exactly as in the instant case, rather than active persecution.

[25]It is certainly true, as the state contends, that in many cases concerning "state regulation in the social and economic field," the Supreme Court has deferred to state decisions concerning

The state's first line of defense for its distinction between legal and illegal residents can be restated, both in substance and tone, as "it goes without saying." In its own words, "the legislature has determined that (educational) funds are to be used to educate the United States' citizens and the legally admitted aliens who reside in Texas." Brief of Defendant Tyler I.S.D. at 16. This, however, does not demonstrate a rational basis; it is merely a reaffirmation of the law itself. The Supreme Court recently rejected a similarly "rational" basis as a mere "assertion that discrimination may be justified by a desire to discriminate". *Examining Board v. Otero*, 426 U.S. 572, 605 (1976).

Nor does the state's adoption of a federal criterion, in this case the illegality of a child's presence in the United States, in itself, provide a rational justification for differential treatment by the state. Mr. Justice Murphy explained this fallacy in his concurring opinion in *Oyama v. California*, 332 U.S. 633 (1948). Assuming that Congress had made a reasonable classification in exercise of its authority to regulate immigration,

> (y)et it does not follow. . .that California can blindly adopt those distinctions for the purpose of determining who may own and enjoy agricultural land. *What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutiona for a state legislature for another and wholly*

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allocation of resources, withut probing too deeply. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio I.S.D. v. Rodriguez, 411 U.S. 1 (1973). However, these cases involved relative rather than absolute deprivations. When a legislature excludes a group entirely, whether or not that group is a suspect class, the Court has focused somewhat more sharply on the state's rationale for the exclusion, requiring a *legitimate* purpose that is, in fact, furthered by the classification. *See* San Antonio I.S.D. v. Rodriguez, 411 U.S. at 59 (Stewart, J., concurring).

> *distinct purpose*. . .. In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. *Is the distinction a reasonable one for the purposes for which the state desires to use it?* To that question it is no answer that the distinction was taken from a federal stataute. . ..

332 U.S. at 664-65 (emphasis added).

Because of the crucial distinction between federal and state power in the immigration area, defendants' reliance on *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), to justify their use of plaintiffs' illegal immigration status as a principle of exclusion, is wholly misplaced. In *Mathews*, the Court upheld a congressional decision to condition an alien's eligibility for federal medical insurance upon continuous residence in the United States and admission for permanent residence. In so holding, the Court noted that "(n)either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests." 426 U.S. at 80. The opinion makes clear, however, that while distinctions in immigration status are legitimate bases for federal classifications, they are normally of no concern to the states.

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United

> States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.

Id. at 85 (footnote omitted). Subsequently, the Court reaffirmed the inappropriateness of state importation of immigration criteria, by holding that the State of New York "can draw no solace from (*Mathews v. Diaz, supra*), however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n. 8 (1977).

The question for determination in this case is, therefore, the one posed by Mr. Justice Murphy in *Oyama:* Is the federal distinction a reasonable one for the purposes for which the state desires to use it? Two main categories of state interests in discriminating against illegal aliens might satisfy this requirement. The first category is state interests which are concurrent with the federal interests for which the distinction was originally drawn. The second category includes state attempts to deal with problems generated by an alien's illegal status, rather than merely with his presence. The California law upheld in *DeCanas* falls within and illustrates both categories, while the Texas statute challenged here belongs to neither.

The rationality of California's section 2805(a) is clearly revealed by the Supreme Court's statement that "the State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes." *Gilbert v. Minnesota*, 254 U.S. 325 (1920). Had section 2805(a) been subjected to an equal protection challenge, it might easily have been upheld as a means of preventing California citizens from encouraging illegal immigra-

tion, *i.e.*, obstructing federal law by employing illegal entrants, [26] or as a local measure dealing with congressionally-recognized problems of local labor.

In the second category of rational state interests mentioned above, the class of illegal workers disfavored by section 2805(a) is clearly distinguishable from the class of lawful resident workers, by virtue of their very illegality. The Supreme Court in *DeCanas* recognized that infiltration of illegal aliens into a labor market has marked effects on that market: "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." 424 U.S. at 356-57. The threat to labor standards posed by employment of illegal aliens is universally acknowledged. *See* sources cited *supra* at n. 10. Illegal immigrants, by virtue of their covert status and fear of exposure, cannot invoke state and federal laws enacted to improve conditions of employment. The nexus between violation of the immigration laws and the resultant adverse effects on a local economy is clear and well documented. Illegal aliens "live under the constant fear of detection and deportation, and are thus easily exploited by employers looking for persons to work at low wages and under poor conditions." Miller, *Immigration and National Law*, 1977 Annual Survey of American Law 205, 228.

In summary, California's decision to require that employers give preference to lawful residents over il-

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[26]The holding of *Gilbert* concerning the first amendment issue raised in that case may no longer be good law. However, this court has found nothing in the Supreme Court's later preemption decisions which overrides the quoted language.

legal entrants is rational for two reasons. First, it borrows the federal criterion in order to deal with the same problems, on a local level, for which, on a national scale, the federal law was enacted. Second, the distinction drawn in section 2805(a) is rational, because characteristics peculiar to illegal workers are central to the threat to labor standards which the law addresses. In contrast, Texas' section 21.031 does not purport to serve any federal purposes. Neither has the state articulated the discrete considerations relating to the status of the class excluded by section 21.031 that make it reasonable for the state to refuse to educate its members. On the contrary, all of the arguments advanced by the state to justify its decision to exclude illegal aliens, as opposed to any other group, are either underinclusive or overinclusive, so as to belie any truly rational connection between the ends sought and the means employed.

The state has not explicitly argued that illegal aliens are distinguishable because they pay lower or no taxes, nor would such an argument have merit. While not conclusive, the preponderance of the evidence indicates that illegal aliens do pay taxes. The major source of the state's educational expenditures is consumer taxes, which no resident of the state, whatever his citizenship or immigration status, can avoid paying. The evidence was to the effect that anyone who rents housing indirecly contributes to the property tax, which accounts for most local educational contributions. Thus, illegal aliens contribute to these public funds on an equal basis with all other residents of the United States. This does not mean, of course, that all residents pay identical amounts of taxes; rather, that illegal aliens are subject to the same taxes as other residents of similar means. As has been mentioned earlier in this opinion, poor families in general pay little income tax. In the context of this case, this is of negligible significance, however; the State of Texas has no income tax, and the federal government collects its major contribution from

the poor by way of Social Security taxes, which illegal workers cannot easily avoid paying. Preliminary Report at 162. It has never been suggested that, simply because his parents are poor and pay comparatively small amounts in taxes, the state is permitted to limit a resident child's access to public education. *See Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (a state "could not, for example, reduce expenditures for education by barring indigent children from its schools."). As the Supreme Court has recognized in analogous situations, "the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes...' (citations omitted). There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the state." *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

As the findings of fact show,[27] in this case the bulk of defendants' evidence was directed at proving what none tried to dispute, that Mexican emigration into the United States has caused grave overcrowding in the border school districts, which has been compounded by the poverty of the parents of the Mexican children and their special needs (bilingual education, free lunch, free breakfast, and free clothing). Excluding illegal immigrant children because of these problems is both irrational, because the undocumented children as a class are basically indistinguishable from the legally resident alien children in terms of their needs,[28] and ineffectual,

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[27] *See supra* at 9-10.

[28] In addition to being shared by legal Mexican immigrant children, the "special needs" of undocumented children which the state claims makes them so burdensome to educate are largely financed by federal funds. The free lunch, breakfast, and clothing are federally subsidized programs in their entirety, while almost half of the cost of bilingual education in Texas is also paid for by the federal government. None of these programs limits funds to documented children. This further undermines the plausibility of the state's decision to save money by excluding these children.

because the dominant problem remains unsolved. Viewed in light of the state's own statement of the issue with which section 21.031 attempts to deal, the irrationality of its choice of means is clearly revealed. An influx of poor, Spanish-speaking children, especially in the school districts adjacent to Mexico, has occasioned the hardships complained of by defendants. Most of these children are legally present in the United States. If exclusion of certain resident children from the school system is chosen as the method of dealing with inadequate educational facilities, the rational approach is to exclude all such problem children regardless of whether they are legal or illegal residents. It would be easy to define the precise limits of such a group, using the various "problem criteria" such as parental wealth, English-speaking ability, age relative to assigned grade, degree of educability, and the other characteristics the state has urged in this lawsuit as a justification for exclusion. A category of all non-English speaking children whose parents own property valued at less than a given amount would probably take care of the situation nicely, in that it would effectively exclude Mexican immigrants.

The obvious unconstitutionality of such a statutory classification presents an insurmountable obstacle to its enactment into law. Nevertheless, bent on cutting educational costs and unable constitutionally to exclude all such "problem" children, the state has attempted to shave off a little around the edges, barring the undocumented alien children despite the fact that they are no different for educational purposes from a large proportion of legally resident alien children. The expediency of the state's policy may have been influenced by two actualities: children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf.

Apart from the arbitrary nature of the state policy, such a marginal approach to a major social problem is

strikingly ineffectual. This court notes with irony that any spectator watching the state's presentation of evidence might easily have mistaken it for a retrial of the *Rodriguez* case, with the State of Texas acting as *amicus curiae* for plaintiffs, emphasizing the plight of the property-poor border school districts under the state's educatinal financing scheme. While upholding the state's scheme of financing public education as constitutional in *Rodriguez*, the Supreme Court never expressed the view that is was perfect, or even wise. Rather, the Court went only so far as to recognize that the system "was implemented in an effort to *extend* public education and to improve its quality," 411 U.S. at 39, and that it "assur(ed) a basic education for every child in the State," *id.* at 49. Consequently, the state's policy was not subjected to close judicial scrutiny.

Texas' present method of financing public education by relying heavily upon the property wealth within a school district has apparently begun to strain at the seams. The state, as well as the children attending threadbare schools, now finds the contemporary policy insupportable. This court expresses no opinion as to how the State of Texas might readjust its public school financing scheme in order to respond to the stark inequalities of educational opportunity between children in the border and metropolitan school districts and children in districts such as the Tyler I.S.D., where the impact of immigration is admittedly negligible. The court can, however, invalidate state efforts that fail to demonstrate a rational basis and that make scapegoats of a defenseless group, chosen in an arbitrary, even invidious manner.

Finally, it is necessary to address the question of whether the statute and policy challenged here have infringed upon an area that is preempted by federal law. In *DeCanas v. Bica, supra*, the Supreme Court considered the preemption argument on three levels. First, the Court declared that although the federal government's exclusive power in the area of immigration is well

established, not every state enactment dealing with aliens is preempted as a regulation of immigration. 424 U.S. at 355. Characterizing section 2805(a) of the California Labor Code[29] as an essentially local effort on the part of the state to "strengthen its economy," the *DeCanas* Court held that the Constitution did not require preemption of such state regulation as "an invalid state incursion on federal power." 424 U.S. at 355—56.

Next, the *DeCanas* Court considered whether Congress, in enacting the Immigration and Nationality Act, had clearly intended a complete ouster of state regulatory power over the employment of illegal aliens. Such a "manifestation of congressional intent to 'occupy the field,'" *id.* at 357 n. 5, or "to preclude even harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular," *id.* at 356, would have required invalidation of the state law under the supremacy clause. The Court found that preemption was not compelled on this basis.

The final inquiry in *DeCanas* focused on whether the California statute burdened or conflicted with any federal laws or treaties. Again, in such a case, the supremacy clause requires preemption "to the extent necessary to protect the achievement of the aims of" the federal legislation, *id.* at 358 n. 5, quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). DeCanas was remanded for a determination of whether the statute presented any "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 424 U.S. at 363, quoting *Hines v. Davidowitz*, 312 U.S 52, 67 (1941).

The *DeCanas* Court apparently found that the California labor statute mirrored the federal government's concern with protection of the domestic labor market. *See* 424 U.S. at 363. Depending upon how it is construed by

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[29] *See* note 17 *supra*.

the state courts, the statute may withstand the preemption challenge. In sharp contrast, the Texas statute at issue in the instant case is inconsistent with the federal scheme and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 312 U.S. at 67, as expressed not only in the Immigration and Nationality Act but also in federal laws relating to funding and discrimination in education. Thus, under the third preemption principle enunciated in *DeCanas*, section 21.031 must fall.

The questions of section 21.031's consistency with congressional intent and of its validity under the equal protection clause are intimately related. Congressional sensitivity to the constitutional rights of those it regulates is traditionally assumed by courts in assessing congressional intent. *Id.* at 74; *Kent v. Dulles*, 357 U.S. 116, 129 (1958). As already set out, the subcategory of illegal aliens affected by section 21.031 consists of more or less settled families, who have established deeper roots in this country than the much more typical single temporary illegal worker. The plaintiff families in this suit, for example, have lived in Tyler for years and are likely to remain unless deported. The state has accepted their taxes and its citizens have profited by, perhaps even exploited, their labor. Regardless of the doctrinal language chosen, the fundamental issue is what burdens the state may impose on established residents who are in violation of federal immigration laws.

In its exclusive authority to regulate immigration, Congress has chosen to limit the number of aliens who may emigrate into the United States each year. The preference system now in effect reveals two primary principles of selection: family unification and protection of the domestic labor market. The testimony and exhibits in this case reveal that federal enforcement efforts follow two major patterns. The most massive strategy is to prevent illegal migration at the border: forty percent of I.N.S. resources are devoted to the area of initial

entry. Preliminary Report at 76. Further into the interior, detection and enforcement efforts are primarily geared toward places of employment. Once an illegal entrant is detected, he is either criminally prosecuted, deported, or told to leave voluntarily. The last procedure is the most widely used, since the I.N.S. has insufficient resources to institute formal proceedings against the overwhelming numbers of those detected.

While California's labor law may fit harmoniously into this framework of federal purpose and priorities, section 21.031 of the Texas Education Code is irreconcilable with the federal scheme. The California statute penalizes *employers* for not abiding by the employability criteria already established by Congress; there is no indication that Congress in any way intended to impose on *illegal entrants* the kind of penalty devised by defendants here. On the contrary, the federal scheme bespeaks the intent to deal with the problem of illegal aliens at the source, or as close to the source as possible; this approach is generally conceded to be the most humane, *see, e.g.*, Preliminary Report at 96. The federal government's method is to turn the illegal alien back at the border and destroy his main incentive for coming, rather than to let him enter and establish roots, and then treat him as if he were a second-class citizen.

Furthermore, federal laws consistently demonstrate a strong congressional commitment to education, in particular the education of disadvantaged children. For example, 20 U.S.C. 241(a) announces the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide

> financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

Nothing in the statute distinguishes between documented and undocumented children. *See* 20 U.S.C. §241(c). Moreover, federal law prohibits denial of educational opportunity to non-English speaking children through failure to provide bilingual education. 20 U.S.C. § 1703, *Lau v. Nichols*, 404 U.S. 563 (1974).

The federal government's commitment to expanding educational opportunity is also evidenced in the Protocol of Buenos Aires, cited by plaintiffs in their trial brief:

> The member states will exert the greatest efforts, *in accordance with their constitutional processes*, to ensure the effective exercise of the right of education on the following basis:
>
> (a) Elementary education compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge. (Emphasis added.)

See 21 U.S.T. 607, T.I.A.S. No. 6847 (1970).

While none of these federal laws or policies precisely and expressly prohibits the state conduct complained of in this case, that is not dispositive of the preemption challenge, "(f)or when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which

needs must be implied is of no less force than that which is expressed." *Savage v. Jones*, 225 U.S. 501, 533 (1912). The Texas statute challenged here defeats the clear implications of federal laws covering both illegal aliens and education of disadvantaged children.

In summary, federal law is geared toward the exclusion of illegal aliens. Illegal entry is a misdemeanor, punishable upon first commission by not more than six months imprisonment or $500 fine, or both; subsequent commissions are felonies. 8 U.S.C. §1325. However, criminal prosecutions are infrequently undertaken, and the primary enforcement tool is volntary departure, Preliminary Report at 81-82. This simply restores the status quo, as if the entrant had never arrived. Because of the congruency of employment and presence in the United States, that is, the absence of any motivation to stay if employment is unavailable, the I.N.S. strategy of detecting illegal entrants at their place of employment has, albeit indirectly, the same basic purpose and effect as deportation. The federal government appears tohave little interest in employing punitive measures other than as a deterrant in service of its major purpose of exclusion.

Nothing in the Immigration and Nationality Act indicates that additional burdens on illegal immigrants are to be imposed at the whim of the various states. Furthermore, federal laws dealing with education render denial of education to undocumented children among the additional penalties Congress would be least likely to tolerate. Certainly two of the reasons for congressional concern with education of poor, non-English speaking children are the conviction that merit is as likely to be found and developed in such children as in any others, as long as they are given a chance; and the tremendous disadvantages suffered by children who grow up uneducated in a modern

society. The undisputed testimony at trial indicated that if these already disadvantaged children are denied an education when they are young, they will be forever relegated to the lowest level of employment. If the state refuses to educate them now, even a future grant of amnesty by Congress will not prevent many of these children from having been permanently stigmatized and crippled by their former illegal status. By virtue of its irreparability, this is a particularly harsh-perhaps even cruel and unusual-penalty for the state to impose for commission of a federal misdemeanor, and a penalty that sounds a distinctly discordant note in the midst of the fundamentally humane objectives service by relevant federal laws.[30]

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[30]Of course, the proposed federal legislation--which would be an even clearer indicator of appropriate judicial action than presently exists--does not have the force of law. Nevertheless, the pendency of such legislation underscores the dangers inherent in state regulation of resident illegal aliens which goes beyond federal regulation on that front. If permitted to do so, a state might take action, as Texas has done with §21.031, which could thwart any future congressional amnesty program. President Carter, for example, has recommended adjustment of status in order to avoid "a permanent 'underclass' of millions of persons who have not been and cannot practicably be deported." Office of the White House Press Secretary, President's Message to the Congress on Undocumented Aliens at 5 (Aug. 4, 1977). Should undocumented children currently residing in Texas be denied education, the seeds of that "underclass" will already irretrievably have been sown.

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

JOINT APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

* * *

NO. 80-1538

* * *

JAMES PLYLER, Et Al.
V.
J. AND R. DOE, Et Al.

* * *

NO. 80-1934

* * *

STATE OF TEXAS, Et Al.
V.
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et.al.

VOLUME A

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DOCKET ENTRIES

A. DISTRICT COURT:

9/6/77	Original Complaint, Attorney John C. Hardy Accepted Service For The Tyler Independent School Board.
9/9/77	Oral Hearing On Plaintiff's Motion For Preliminary Injunction.
9/12/77	Order Preliminary Enjoining Defendants From Refusing To Enroll Minor Plaintiffs In The Tyler Public Schools Or Requiring Them To Pay Any Tuition Fee...
10/25/77	Order That This Action Be Maintained As A Class Action On Behalf Of All Undocumented School Age Children Of Mexican Origin Residing Within The Tyler Independent School District.
12/5/77	Defendant's Original Answer.
12/12/77	Case To Trial On The Merits...
1/5/78	Amended Complaint of Plaintiffs.
9/14/78	Memorandum Opinion.
9/14/78	Permanent Injunction.
10/10/78	Notice of Appeal By Defendants.
10/17/78	Notice of Appeal By State Of Texas.

5TH CIRCUIT:

10/23/78 Date Docketed.

10/20/80 Opinion Rendered.

11/17/80 Order Denying Rehearing.

11/26/80 Judgment As Mandate Issued to Clerk.

12/18/80 Filing Appellants' Notice of Appeal To U.S. Supreme Court.

ORAL HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SEPTEMBER 9, 1977

TESTIMONY PRESENTED BY PLAINTIFFS

H. LOE

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a witness called by the plaintiffs, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

By Ms. Rodkin

Q. State your name, please.

A. H. Loe.

Q. What is your address, H. Loe.

A.

Q. Is your address within the boundaries of the Tyler Independent School District?

A. Yes.

Q. Do you have any children?

A. Yes.

Q. What are their names and ages?

A. A. A. Loe, eleven years old.

THE COURT: What is that middle name?

INTERPRETER: (spelling).

THE COURT: Age what?

INTERPRETER: Eleven.

A. L. Loe, ten years old; M. D. Loe, eight years old; G. Loe, seven years old; M. A. Loe, six years old; C. Loe, five years old; H. Loe child three years old; M. Loe three months.

Q. Are any of your children American citizens?

A. One.

Q. Which one is that?

A. M. Loe.

INTERPRETER: M. Loe is the three-months-old citizen child.

MS. RODKIN: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. I would like to show H. Loe what has been marked for identification as Plaintiffs' Exhibit 1, and does he recognize that?

INTERPRETER: Yes, he says it is the act of his son. It is the birth certificate given to him at Mother Frances Hospital at the birth of his son M. Loe.

THE COURT: M. Loe is now three months of age?

INTERPRETER: Yes, sir.

MR. HARDY: We have no objection at this time, Your Honor. We fail to see the materiality of this.

THE COURT: Since the child is not of school age, I think it is of doubtful materiality, but it will be received in evidence.

(BIRTH CERTIFICATE OF M. LOE FROM MOTHER FRANCES HOSPITAL -- was duly marked as: PLAINTIFFS' EXHIBIT NO. 1).

MS. RODKIN: Thank you, Your Honor.

Q. H. Loe, have any of your children attended the Tyler School District?

A. Yes.

Q. How many years have these children gone to school in the Tyler schools?

A. One year.

Q. Which children attended for one year?

A. A. A. Loe, L. Loe, M. Loe, D. Loe, G. Loe.

Q. What grades were these children in?

A. A. A. Loe in the fourth grade; L. Loe in the third grade; M. D. Loe in the second grade; G. Loe was in the first grade.

Q. Did M. A. Loe attend the Headstart Program in the summer of 1977 preparatory to entering first grade?

A. This summer M. A. Loe did attend the Headstart program to prepare himself for first grade.

Q. Are any of his children attending the Tyler schools now?

A. No.

Q. How did you learn that they would not be in school this year?

INTERPRETER: Last year he was told that he would probably have problems getting his children in the school unless he had some type of permission.

Q. Who told him that?

A. The Director of the school and an interpreter.

Q. Who is the Director of the school?

INTERPRETER: He does not remember the name at this particular point.

Q. Did he try to find out if his children could attend school this year?

A. Yes.

Q. What did he do?

INTERPRETER: His wife went to inform herself directly at the school and was told that there was nothing that could be done.

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Q. Did anyone inform him to a right to a hearing before the children would not be allowed in school?

A. No.

Q. H. Loe, when did you come to Smith County?

INTERPRETER: He doesn't know what Smith County is.

Q. When did he come to Tyler?

A. In 1974.

THE COURT: Excuse me. Is there some disagreement?

MR. IDROGO: Yes, Your Honor, he did not translate Smith County. He said, "Smith County," and Smith County is not a translation.

(REPORTER'S NOTE: Mr. Idrogo retranslated the question.)

MR. IDROGO: 1974.

Q. Are you employed, H. Loe?

A. Yes.

Q. When you receive wage stubs, are federal and Social Security taxes withheld from your wages?

A. Yes.

MS. RODKIN: May I approach the witness, Your Honor?

Q. I would like to show you what has been marked for identification as Plaintiffs' Exhibit 2. Do you recognize this?

THE COURT: If you want to look at that, feel free to go up.

INTERPRETER: Yes, they are his check stubs.

(PHOTOCOPIES OF STUBS OF CHECKS TO H. LOE – were duly marked as: PLAINTIFFS' EXHIBIT NO. 2)

Q. Are these the check stubs you received from your employer in the past month or so?

A. Yes.

MR. HARDY: No objection at this time, Your Honor.

MS. RODKIN: We would move this into evidence, Your Honor.

THE COURT: How is it marked?

MS. RODKIN: Plaintiffs' Exhibit 2.

THE COURT: Plaintiffs' Exhibit 2 is received in evidence.

Q. H. Loe, have you ever bought a car when you were living in Tyler?

A. Yes.

Q. Did you have to secure registration receipt from the county tax assessor-collector's office?

A. Yes.

Q. I would like to show you what has been marked for identification as Plaintiffs' Exhibit 3. Do you recognize this?

INTERPRETER: Yes, this is what was given to him when he was given the license plates to his car.

MR. IDROGO: Your Honor, I wonder if we could clarify or let him know that these are exhibits.

THE COURT: That these papers are what?

MR. IDROGO: These are exhibits by the plaintiff. He just tells him, "Do you know this paper?"

(REPORTER'S NOTE: Mr. McAndrew asks the witness a question.)

INTERPRETER: He knows that.

MR. HARDY: No objection to Plaintiffs' Exhibit 3.

(PHOTOCOPY OF A TAX RECEIPT ON CAR LICENSE IN THE NAME OF H. LOE – was duly marked as: PLAINTIFFS' EXHIBIT NO. 3)

MS. RODKIN: Plaintiff would move this into evidence, Your Honor.

THE COURT: Any objection?

MS. CARDWELL: No, Your Honor, I do not.

THE COURT: Plaintiffs' Exhibit 3 is received in evidence.

Q. H. Loe, are you aware that the tuition fee is approximately $1,000.00 per year per child to attend Tyler schools if you do not have documents of lawful status in this country?

INTERPRETER: Yes, he does.

Q. Can you afford to pay $1,000.00 per year per child for your children to attend Tyler schools?

INTERPRETER: No, his salary does not meet that quantity of money.

Q. Is it correct that you would have five children in the Tyler schools this year, meaning a payment of $5,000.00?

A. Yes.

Q. And he cannot afford that sum of money?

A. No.

Q. Are his children in school anywhere right now?

A. In no area whatsover.

Q. Would your children be in the Tyler schools if no tuition were charged?

A. Yes.

MS. RODKIN: May I have a moment, Your Honor?

(REPORTER'S NOTE: Plaintiffs' counsel here confer out of the hearing of the court reporter.)

Q. H. Loe, do you or your wife have any documents showing that you are in this country lawfully?

A. No.

Q. Are you entitled to receive those documents, or are you, in fact, in the country unlawfully?

INTERPRETER: There is no way of obtaining them. To the second question, is he in the country illegally, the answer is yes.

TESTIMONY OF J. DOE

[page 79]

EXAMINATION

By the Court

Q. What is your rate of pay?

A. By the week?

Q. Whatever.

A. Approximately $130.00 or $140.00. It varies.

Q. What was your approximate income last year during the year 1976?

A. I don't have the slightest idea.

Q. Were you being paid at the same rate during 1976 that you are being paid at the present time?

A. They used to pay me by the week, and they paid me $105.00.

Q. During the whole year of 1976?

A. Yes, that way.

Q. Do you own your own home?

A. No, I am renting.

Q. What rent do you pay?

INTERPRETER: He pays $50.00 rent.

Q. For what period of time?

A. A month.

Q. $50.00 per month?

TESTIMONY OF J. DOE

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THE COURT: Please be seated. Your may call your next witness. You may proceed.

MS. RODKIN: We call Mr. J. Doe.

THE COURT: Translate the oath for him, please.

BY MS. RODKIN:

Q. J. Doe, do you have any children who are American citizens?

A. One.

THE COURT: I'm sorry, but how many children were there, and what were their ages? Just repeat it for me. I'll ask her (indicating Ms. Rodkin).

MS. RODKIN: There are eight children altogether, Your Honor (sic). I believe the youngest is---.

THE COURT: What is the oldest one?

MS. RODKIN: Thirtteen.

THE COURT: And the youngest?

MS. RODKIN: I believe three.

THE COURT: And how many of them are of school age?

MS. RODKIN: Five.

MR. HARDY: I believe the testimony shows six children, Your Honor.

THE COURT: Six children of school age?

MR. ROOS: Five of school age, Your Honor, and one is not of school age. I believe that's the testimony.

MS. RODKIN: I'm sorry. I stand corrected.

THE COURT: All right, please proceed.

BY MS. RODKIN:

Q. I would like to show you what has been marked for identification as Plaintiffs' Exhibit 4, and does he recognize that exhibit?

A. What is it?

Q. Do you recognize it?

A. Yes, it is of the young child N. Doe.

THE COURT: It is of the young child's what?

INTERPRETER: N. Doe, his name, Your Honor.

THE COURT: Oh, I see.

Q. Is it N. Doe birth certificate?

A. Yes.

(BIRTH CERTIFICATE OF N. Doe – was duly marked as: PLAINTIFFS' EXHIBIT NO. 4)

MS. RODKIN: Plaintiffs would offer this into evidence as Plaintiffs' Exhibit 4.

MS. CARDWELL: No objection.

THE COURT: Plaintiffs' Exhibit 4 will be received in evidence.

Q. J. Doe have your children attended the Tyler schools in the past?

A. Yes.

Q. Did J. I. Doe attend the Tyler schools from the first through the sixth grade?

A. Yes.

Q. Did J. D. Doe attend the Tyler schools in Tyler from the first through the fifth grade?

A. Yes.

Q. Did E. Doe attend the Tyler schools from the first through the fifth grade?

A. Yes.

Q. Did Ed Doe attend the Tyler schools from the first through the fourth grade?

A. Yes.

Q. Did R. Doe attend the Tyler schools from the first through the third grade?

A. Yes.

Q. Are any of these children attending the free schools in Tyler now?

A. No.

Q. Is J. D. Doe in the Tyler schools now?

A. Yes.

Q. Have the other children been excluded from the schools, except for J. D. Doe?

A. Yes.

Q. Do you know why J. D. Doe has not been excluded from the schools?

A. No, I don't know.

Q. How did you learn that your children would not be able to attend the schools this year, unless they paid tuition?

A. Last year they came up to tell me at the beginning of the year they would have to pay.

Q. Who told him that? Who told you that?

A. Last year two ladies came – one of them was an interpreter. The other one was a school official.

Q. Do you know their names?

A. No.

THE COURT: Where did they come to, to his home?

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All right, please proceed.

BY MS. RODKIN:

Q. Can you obtain these papers?

A. Not now.

Q. Are you, in fact, in this country unlawfully?

A. Yes.

Q. When did you come to this country, J. Doe.

A. 1968.

Q. Have you been in Tyler since 1968?

A. Yes.

Q. Are you employed?

A. Yes.

Q. Does your employer withhold federal and Social Security taxes from your paycheck?

INTERPRETER: Federal and what?

MS. RODKIN: Social Security.

A. Yes.

Q. Did you file returns on your income with the federal government since you have been here?

INTERPRETER: Did you file returns with the federal government?

MS. RODKIN: Did you file income tax returns with the federal government since you have been here?

INTERPRETER: This is hard to translate, "file returns."

Q. Did you file income tax returns with the federal government since you have been here?

THE COURT: Perhaps counsel can help with this.

(REPORTER'S NOTE: Ms. Hanten assists interpreter.)

A. Like what thing?

INTERPRETER: This is what I meant, Your Honor.

MS. RODKIN: May I approach the witness, Your Honor?

Q. I want to show you what has been marked for identification as Plaintiffs' Exhibit 5.

INTERPRETER: Would the counsel tell me how to say plaintiff in Spanish?

(REPORTER'S NOTE: Ms. Hanten complies.)

A. The one that you use for the income tax?

Q. Yes, it's eight pages. Do you recognize it?

A. Yes, I do recognize these income tax forms.

Q. What are they?

A. It is where they send you money back or you have to pay.

THE COURT: I see he understand the concept. (LAUGHTER).

Q. Is this for the years 1969 through 1976?

A. Yes.

(COPIES OF INCOME TAX RETURNS FOR FROM 1969 THROUGH 1976 -- were duly marked as: PLAINTIFFS' EXHIBIT NO. 5).

MS. CARDWELL: I have no objection.

MR. HARDY: No objection.

THE COURT: How is it marked?

MS. RODKIN: Plaintiffs' Exhibit 5.

THE COURT: Plaintiffs' Exhibit 5 is received in evidence.

Q. J. Doe have you purchased a home in Tyler?

A. Yes.

Q. I want to show you what has been marked for identification as Plaintiffs' Exhibit 6. Do you recognize that?

A. Yes.

Q. What is that?

A. It is the contract of the house.

THE COURT: It is a what?

INTERPRETER: The contract.

Q. Is this the deed you filed at the County Courthouse

Yes, it is on the house I am paying on.

(COPY OF DEED TO PURCHASE OF HOME BY J. Doe was duly marked as: PLAINTIFFS' EXHIBIT NO. 6).

MR. HARDY: We have no objection, Your Honor.

MS. RODKIN: This is Plaintiffs' Exhibit 6.

THE COURT: Plaintiffs' Exhibit 6 is received in evidence.

Q. Have you ever purchased a car in Tyler?

A. Yes.

Q. I want to show you what has been marked for identification as Plaintiffs' Exhibit 7. Do you recognize that?

A. Yes.

Q. What are they?

A. 1968 Ford.

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Q. Are you receiving or is anyone in your family receiving any type of public assistance or welfare?

A. No, nobody is receiving it.

Q. Have you or your spouse or anyone on your children's behalf requested a hearing before any school official,

objecting to your children's denial of admission to the Tyler schools?

A. Just now, just when I spoke with Mr. Washington.

Q. Are your children able to speak the English language?

A. Yes.

MR. HARDY: Pass the witness.

REDIRECT EXAMINATION

BY MS. RODKIN:

Q. J. Doe, when did you receive your Social Security card?

A. When I came here for the first time.

Q. Did Z. Boe, S. Boe and X. Boe attend the Tyler schools for three years?

A. Yes.

Q. Were all three in school last year in the Tyler schools?

A. Yes.

Q. How did you learn that they were not going to be able to go to school this year?

A. I was waiting for the schedule or the cards to come for them to go to school, and they were never sent to me.

Q. Did Mrs. Copeland, a teacher, tell her children last year that they would not be able to go to school this year?

A. Yes.

Q. Did Mr. Mathis send the children home from school this year?

A. Yes.

Q. Did he send home Z. Boe, S. Boe and X. Boe.

A. Yes.

Q. Did anyone advise you of a right to a hearing before your children were not permitted at school?

A. No.

Q. When did you first come to Tyler?

A. In 1964.

TESTIMONY OF F. BOE

[page 103]

a witness called by the plaintiffs, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MS. RODKIN:

Q. What is your name, please?

A. F. Boe.

THE COURT: Would you spell the last two names, please?

INTERPRETER: Your Honor, her name is F. Boe (spelling).

THE COURT: All right, please proceed.

Q. What is your address, F. Boe?

INTERPRETER: She doesn't know.

Q. Is it in Tyler?

A. Yes.

Q. Do you have any children?

A. Yes.

Q. What are their names and ages?

(PAUSE)

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MS. RODKIN: Perhaps it would save time if I went through them.

INTERPRETER: She's rather vague on some of her information, Your Honor, because she lost the birth certificates, and she can't remember the dates, so she's trying to recall them the best way she can, the dates.

Q. Do you have a child F. Boe, age twelve?

A. Yes.

Q. Do you have a child Z. Boe age thirteen?

A. Yes.

Q. Do you have a child S. Boe age eight?

A. Yes.

Q. Do you have two young children who were born in this country not in school yet?

A. Yes.

Q. Is that X. Boe and T. Boe?

A. Yes.

Q. And do you have one older child who has dropped out of school?

A. Yes.

Q. Named R. Boe?

A. Yes.

Q. Are those all your children?

A. Yes.

Q. Have you lived in Tyler since 1964?

A. Yes.

Q. Are you in this country lawfully?

A. No.

Q. Except for the two children, V. Boe and T. Boe, are your other children in this country illegally?

INTERPRETER: She doesn't know.

Q. Do they have any documents from the Immigration Service

No.

Q. Are your children in—?

A. I have a letter that was sent to me by a compadre, a close friend that was sent to me, but I don't know where it is.

Q. Are your children attending any school now?

A. No.

Q. Can you afford to pay the tuition fee of $1,000.00 per year?

A. No.

Q. Except for the policy of charging tuition for the Tyler schools, would your children be in the Tyler schools now?

INTERPRETER: She doesn't know.

THE COURT: I don't believe she understands the question.

(REPORTER'S NOTE: The interpreter repeats the question.)

INTERPRETER: She doesn't know.

THE COURT: Ask her this. If the school system were not charging tuition, would you send your children to school?

THE WITNESS: Oh, yes.

TESTIMONY OF J. ROE

DIRECT EXAMINATION

[page 119]

BY MS. RODKIN:

Q. State your full name.

A. J. Roe.

(REPORTER'S NOTE: The interpreter spells the name for the court.)

Q. What is your address?

A.

Q. Is that in the City of Tyler?

A. Yes, in Tyler.

Q. Do you live within the Tyler Independent School District boundaries?

INTERPRETER: He says he does live within the Loop, the district.

Q. Do you have any children?

A. Yes.

Q. What are their names and ages?

INTERPRETER: He's got three children: A. Roe, ten; F. Roe, eight; N. Roe, six.

Q. Do you have any younger children that are American citizens?

A. Yes, I have two, one that is and one that isn't.

THE COURT: I'm sorry. I have two what?

INTERPRETER: Children, one that is an American citizen and one that isn't.

(REPORTER'S NOTE: Interpreter and witness converse.)

INTERPRETER: The name of the two children are J. Roe and An. Roe. The citizen is J. Roe.

Q. I want to show you what has been marked as Plaintiffs' Exhibit 10 and ask you if you recognize it?

A. This is a copy of the paper that was given of Jose of the birth certificate.

(BIRTH CERTIFICATE OF J. Roe was duly marked as: PLAINTIFFS' EXHIBIT NO. 10).

MR. HARDY: We have no objection.

MS. RODKIN: This is identified as Plaintiffs' Exhibit 10.

THE COURT: Plaintiffs' Exhibit 10 is received in evidence.

Q. Did your three older children attend the Tyler schools last year?

A. Two of them attended school last year, and the young one attended school this summer.

INTERPRETER: Possibly Headstart.

Q. Was that Noe that attended a summer program before entering the first grade?

A. Noe was the one that was in the summer program.

Q. How many years did A. Roe and F. Roe go to the Tyler schools?

A. Just one year.

Q. Are your children attending school in the Tyler schools?

A. No.

Q. Why is that?

A. They told me they weren't going to admit them any more.

Q. Who told you that they would not admit your children?

INTERPRETER: His wife told him another lady had taken them to school, and they told him they would not admit them without papers or permission.

Q. What kind of papers?

INTERPRETER: He thinks it was the papers of immigration or permission, or he doesn't know – maybe what the President said.

Q. Do you have any papers saying you are in this country lawfully?

INTERPRETER: He is not legally in the United States. He is illegally in the United States.

Q. Are your children, except for the youngest one, in this country unlawfully?

INTERPRETER: He said the other four are illegal, except for the youngest one.

Q. When you found out your children could not attend school, did anyone tell you you had a right to a hearing ahead of time?

A. No.

Q. When did you come to Smith County or to Tyler?

INTERPRETER: He's not very sure. It was either 1968 or 1969.

Q. Are you currently employed?

A. Yes.

Q. Where is that?

A. At

Q. I want to show you what has been marked as Plaintiffs' Exhibit 11, and do you recognize that?

A. Yes, it is my Social Security number.

Q. Are these your wage stubs from

INTERPRETER: Yes, he says they are. That's his badge number and Social Security number.

THE COURT: This is his what number and Social Security number?

INTERPRETER: Badge number.

THE COURT: Badge number?

INTERPRETER: And Social Security number.

Q. And on your wage stubs they have deducted federal and Social Security taxes. Is that right?

A. Yes, they take out income tax and Social Security and other things, and No. 4, which is United Fund.

(WAGE STUBS OF J. Roe FROM were duly marked as: PLAINTIFFS' EXHIBIT NO. 11).

MR. HARDY: No objection.

MS. RODKIN: We would move for admission of Plaintiffs' Exhibit 11.

THE COURT: Plaintiffs' Exhibit 11 will be received in evidence.

Q. Were you employed in 1976?

A. Yes.

Q. Where were you employed?

INTERPRETER: Yes, he worked in ____ and ____.

THE COURT: Where was this?

REPORTER'S NOTE: Interpreter and witness converse.)

INTERPRETER: (phonetic) and

THE COURT: In what city?

INTERPRETER: Here in Tyler.

Q. I want to show you what has been marked for identifi-

cation as Plaintiffs' Exhibit 12 and ask you if you recognize this?

A. Yes, these are the papers of the income tax.

(INCOME TAX PAPERS OF J. Roe were duly marked as: PLAINTIFFS' EXHIBIT NO. 12).

MR. HARDY: I have no objection.

MS. RODKIN: I move the admission of Plaintiffs' Exhibit 12.

THE COURT: Plaintiffs' Exhibit 12 is received in evidence.

Q. Have you ever purchased a car in Tyler, J. Roe?

A. Yes.

Q. I want to show you what has been marked for identification as Plaintiffs' Exhibit 13. Do you recognize that?

A. Yes, these are the papers of the title and the license plates of my car.

(CAR TITLE AND LICENSE PAPERS OF J. Roe - were duly marked as: PLAINTIFFS' EXHIBIT NO. 13).

MR. HARDY: We have no objection.

MS. RODKIN: Plaintiffs would move the admission of Plaintiffs' Exhibit 13.

THE COURT: Plaintiffs' Exhibit 13 will be admitted into evidence.

Q. Are your children attending school anywhere now?

A. No, nowhere.

Q. Can you afford to pay the tuition fee of $1,000.00 per year per child?

A. No.

Q. Would your children be attending Tyler schools if you did not have to pay the tuition?

A. Yes.

Q. Do you know of any other children, in addition to the ones who have been here, who have not been in the Tyler schools this year because they don't have papers?

INTERPRETER: At this moment he doesn't know.

MS. RODKIN: May I have a moment, Your Honor?

(REPORTER'S NOTE: Plaintiffs' counsel here confer out of the hearing of the court reporter.)

MS. RODKIN: Pass the witness.

TESTIMONY OF WILLIAM J. CHAMBERS

[page 134]

Q. Would you state your name for the court, please?

A. William J. Chambers.

Q. What is your position? Where are you employed?

A. I am District Director of the Dallas District of the U.S. Immigration and Naturalization Service.

Q. Are you appearing here today pursuant to subpoena?

A. Yes, I am.

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BY MS. CARDWELL:

Q. How long have you been with the Immigration and Naturalization Service?

A. Twenty-seven years.

Q. Prior to Director what position did you occupy?

A. I was an Assistant District Director in Houston.

Q. In the district in which you are now Director, could you tell the court what that covers, what area that covers geographically?

A. Yes, it covers the hundred twenty northernmost counties of Texas and the complete State of Oklahoma.

Q. That, of course, includes Tyler?

A. Yes, it does include Tyler.

Q. Do you have an approximate idea or estimation or a way to make an estimate or idea of the number of illegal aliens that are in your district?

A. Well, for planning purposes, we have estimates of how many we feel are within our district, and this is based on past experience, the number of apprehens previously and things of this type, and we estimate that

there are some 235,000 within our complete district.

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Q. Do you have records, or is it possible to keep records on the people in terms of where they are, how many children they might have of school age?

A. No, we don't have specific recods of this type, no.

Q. Why is it so difficult or why can one not have those records?

A. Well, primarily, and one of the reasons why there are so many undocumented aliens within our jurisdiction is that we just don't have the manpower and resources to handle the situation. Consequently, we have this large concentration, and with this more or less being out of control, then we do not have records along these lines of the ones that are within our area. We have not had contact with most of these. These are ones that are in the area and are in illegal status, and we have not had the manpower or resources to remove them.

[page 138]

Q. You say the main reason they come into the States is to obtain employment. In your dealings with the aliens who have come, those who have been undocumented or have been sent back, have you ever learned that there is a majority that are discouraged from coming into the State, because they don't have free educaiton here for illegal aliens?

A. That are discouraged from coming because they don't have free education?

Q. Right, is that a big discouragement to illegal immigration?

A. Not in my experience. This is not something that I have encountered in my experience.

Q. Based on your experience, if free education were available, would you think that would encourage or discourage immigration into the State, if free education were available for illegal aliens?

A. Well, it certainly wouldn't discourage additional immigration, because this would be an additional benefit that they could derive by being in the United States, yes.

[page 144]

Q. In terms of the aliens that are illegally in the country from Mexico, is it your experience that they are almost one hundred percent Spanish-speaking and not bilingual?

A. Well, of course, we have aliens from many, many countries of the world. They are predominantly Mexicans in our case in this part of the country, but, for instance, our office last year handled aliens from sixty different countries, but, as you say, predominantly they are from Mexico and also predominantly they do not speak English.

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CROSS-EXAMINATION

BY MS. HANTEN:

Q. Mr. Chambers, you have testified that one of the ways an alien can adjust his or her status is through family relationship, and you mentioned the parent-child relationship.

A. This is correct.

Q. What age does the child have to be to petition for his or her parents—?

THE COURT: Would you put the microphone a little closer to your mouth? What age what now?

Q. At what age may a citizen child petition for his or her parents?

A. They have to be twenty-one years old to petition for a parent.

Q. So that a family here illegally with one citizen child has no way at the present time to adjust their status through the citizen child?

A. Through the citizen child, no.

Q. Isn't it true that certain amendments to the Immigration and Naturalization Act became effective this last January?

A. This is correct.

Q. And isn't it true that those amendments set a number of visas which would be available for Mexican immigrants?

A. Yes, this is correct, not only Mexican, but all Western Hemispher.

Q. And that number is 20,000?

A. The basic number is 20,000. In addition or additionally, whatever number of immediate relatives can come in over and above that number, yes.

Q. Any number of immediate relatives can come in?

A. That's right.

Q. So could 100,000 immediate relatives come in, or is there some other limitation, other than the 20,000 base?

A. No, the immediate relatives fall outside any numerical limitations.

Q. Then is it the case that every visa application made during the year for an immediate relative is granted?

A. It would not be necessarily granted within that year, but if they are eligible, if it is a bona fide application, yes, it would be approved.

Q. At some time?

A. Yes.

Q. But during the pendency of that period the person who has been petitioned for does not have legal status in the United States. Is that correct?

A. That's correct.

Q. So until the visa is granted, after whatever period of time the person in question remains an illegal – remains an undocumented alien in the United States?

A. They remain an undocumented alien. We have various provisions, depending on individual circumstances, as to whether we leave them here for a period of time or periods of time, or whether they are removed from the country, yes.

Q. But that is at the discretion of the agency. Isn't that correct?

A. Yes.

Q. When you testified that during the past year 44,000 visas for Mexican nationals were granted, that was prior to the Idleburgh Amendments or the January Amendments to the Immigration and Naturalization Act?

A. Yes, I am referring to fiscal year '75.

Q. Will the passage of the Idleburgh Amendments and the change in the Immigration and Naturalization Act, which took effect in January, affect the number of visas granted to Mexican nationals for this coming year and succeeding years?

A. Well, that's a matter of opinion. I don't know for sure. It depends, really, on the demand for visas from Mexico.

Q. What is the normal number of visa applications filed on behalf of Mexican nationals each year?

A. Well, this has fluctuated over the years, and just like, as you mentioned, this new law makes a difference in the people that are eligible. For instance, prior to the change of the law, U.S. citizens could not petition for brothers and sisters within the Western Hemisphere. Now they can, so there are some changes in the law, and it would only be a projection on my part to say how many will apply. Now, in our own operation we have had quite an increase in the number of applications that we have been receiving sinc ethis law has gone into effect.

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Q. From the time the citizen petitions for a non-citizen spouse until the non-citizen spouse visa is granted.

A. O.K., this will vary, depending on what office they are applying through, because we have backlogs within our Service due to lack of personnel and the volume of business, and this waiting period within our Service varies from office to office.

Q. What is the backlog in your office, the average backlog?

A. It has recently improved considerably since we are working seven days a week, but now, the type you're talking about, from the time they submit the petition in probably about three months we will approve the petition in about three months, and then, of course, it depends on what their eligibility is from that point, whether they can apply for change of status in the United States, or whether they have to depart the country and get their visa outside the country.

Q. How long is the average wait on a visa application by a permanent resident spouse on behalf of a non-citizen spouse or a non-resident—?

A. These are processed the same.

Q. Would it be the same time?

A. Yes.

Q. Do you have any opinion as to whether your office processes these applications on an average faster than offices in the surrounding area, slower than offices in the surrounding area or at the same rate?

A. And by surrounding area—?

Q. Texas. You have the northern counties of Texas and Oklahoma.

A. Right.

Q. How about the southern counties of Texas?

A. O.K., for the past year the Dallas office and Houston office have the largest backlog within Texas. The other offices were much more current. In the last three months our backlog has decreased considerably. In fact, three or four months ago our backlog would be almost – it would take almost a year before we were able to process a petition of this type. Now, it would take probably ninety days.

THE COURT: You anticipate that the time will decrease in the future?

THE WITNESS: Well, of course, I hope it does, and it just depends on personnel. Three months ago we had 10,000 applications of all types pending in my particular office. We now have 3,000 something, but this is not due to an increase in personnel. This is due to working Saturdays and some Sundays. We, of course, can't do this indefinitely. Hopefully, we'll get enough employees so it will become a shorter period of time but---.

THE COURT: I see your service and the judiciary have the same problems.

THE WITNESS: Right.

THE COURT: Go ahead.

BY MS. HANTEN:

Q. You also testified that some occupational skills make people eligible for service in the United States.

A. That's correct.

Q. What type occupational skills might those be?

A. Well, this depends on the findings of the Department of Labor. To go through this procedure the alien and the employer makes an application for labor certification, which the labor certification, in effect, says that there are not sufficient people in the United States with these skills, so if they so certify, and there is a visa available in that category, then they can get permanent residence on that basis.

Q. In your experience, what are some samples of those types of skills?

A. Well, normally, they are the higher skills, plus certain areas that there shortages in. For instance, there are certain types of welders that can get labor certifications. There are certain types of engineers that can and certain types that cannot, depending on what areas they are in. It depends on the supply within the United States, actually.

Q. But, generally, these are fairly specialized skills?

A. Usually.

THE COURT: Would you excuse me? Is there any reason to keep spectators out of the courtroom now?

MR. ROOS: I can't think of any reason.

THE COURT: All right, anybody who wants to come into the courtroom may do so.

THE MARSHAL: All right, sir.

Q. Could you explain the preference system under the Idleburgh Bill?

A. Well, of course, this is generally what I have been talking about. The occupational categories – there are two of them. The third preference and the sixth preference are based on occupations. The third preference are the highly skilled areas. These are the areas that doctors and people of this type come in. The sixth preference are primarily those areas that there is a shortage of like skills in the United States. They are not necessarily highly skilled. There could just be a shortage of them.

Q. What is the first preference?

A. It's a spouse of a United States citizen.

THE COURT: What is the what?

MS. HANTEN: The first preference.

Q. And the second preference?

A. That's a spouse of a resident alien, I believe. Don't pin me down on all these different preferences as to specifics, but first and second are based on relationship, and they are spouses, spouses of United States citizens and spouses of resident aliens. Then you have the unmarried children of United States citizens, unmarried children of resident aliens down the line, but the first and second, fourth and sixth are the—.

Q. Are the relationships?

A. Right.

Q. And the third and the sixth (sic) are the occupational--?

A. Right.

Q. If a person is not eligible to apply for a visa under one of these preferences, may they still attempt to apply for a visa?

A. Well, they would not be successful unless they are eligible.

Q. In order to be eligible for a visa, they must fit one of these preferences?

A. They must fit one of these preferences, right, or, not included in the preferences are the immediate relatives, which are outside the preferences.

Q. But at the present time citizen children under twenty-one years of age are not considered to be immediate relatives for the purposes of petitioning for their nonresident relatives to enter the United States?

A. That's correct.

Q. You testified also about the ability to change your status, once you have come in the country on a temporary status. If someone enters on a visitor's visa and overstays that visa and lives and works in the United States, does the fact that that person came in on a visitor's visa give that person any advantage in adjusting his or her status to that of a permanent resident?

A. Yes, it is possible that it would. To back up, if they did not come in under those circumstances, if they weren't legally admitted, then they are patently ineligible. If they came in in legal status as a visitor, for instance, and overstayed, then they would not be precluded from adjusting their status. Now, of course, there's one other stipulation, Section 245, and that is, they cannot have entered into or continued in illegal employment.

Q. So a person who comes in as a visitor or a student, for example, overstays that visa and goes to work, is not eligible to adjust his or her status to that of a permanent resident?

A. That's correct. If they entered into illegal employment subsequent to the date of this new law.

Q. Further, would not a person who came in on a visitor's visa in order to adjust his or her status in the United States have to go through the regular petition process and fit under one of the preferences previously discussed?

A. Yes, uh-huh. Let me add one thing to this. Adjustment would not – a person who is an immediate relative, falling into the category you're talking about, coming in as a visitor and commencing illegal employment and, for instance, marries a United States citizen, which would make him an immediate relative, they would not be precluded from adjustment of status in the U.S. In other words, the illegal employment does not affect an immediate relative.

Q. But they have still got to go through the regular petition process?

A. Yes.

Q. And the fact that they have entered on a visitor's visa does not give them any advantage in adjusting their status. They still adjust on the basis of the fact that they are a spouse of a citizen?

A. Well, if they had not entered with a permit as a visitor, they would not be eligible to adjust. They would have to get their visa outside the country.

Q. Oh, I see, but their eligibility for adjustment of

status, their eligibility for permanent residence comes as a result of their marriage to the citizen and not as a result of their having entered on a visitor's visa?

A. Correct.

Q. Does your office have any mechanism by which they send out letters to people who are eligible at some time in the future for admission to the United States, saying that they will be eligible for admission at some later time?

A. I'm not sure that I understand your question, but there are, for instance, in the area of eligibility based on their occupation, if a petition is submitted for them in that area, they are eligible. Then this petition will be approved. If there are no visas available at that time, then they will be told that there are no visas available. At the time when visas become available, you will be so notified. I assume this is the area you're talking about.

Q. But if there are no visas available at the time, and the persons are in that category which would make him or her be eligible for a visa when one becomes available, there's no interim type of notification that your agency sends to that person?

A. We notify the petitioner of the approval of the petition and notify them also that there are no visas available.

Q. And what is the status of that person in the interim period?

A. Well, if they have no other equities, then they have no claim to remain here, because there's nothing available to them at that time.

MS. HANTEN: Thank you. I have no further questions.

MS. CARDWELL: We have no other questions, Your Honor.

EXAMINATION

BY THE COURT:

Q. Assume this situation, if you will, please, sir.

A common laborer in Mexico, a citizen of Mexico, illegally crosses the border and comes to this area of the state. He has a family -- let's say by way of example, nine or ten children. Assume that one or two of them -- say two of them are born here in the United States during the period of his illegal residence here. In order for this common laborer to seek admission to the United States, what would he have to do -- legal admission?

A. Well, the two American-born children would not give him eligibility, so the only thing left under which he could qualify is if he could qualify through his occupation.

Q. Well, is there a demand for common laborers in the United States of Mexican descent or Mexican citizenship?

A. Of course, the nationality wouldn't enter into it, but not just common laborers. They normally will not certify for just common laborers.

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Q. Do you know whether or not the Immigration and Naturalization Services has made known its plight insofar as the shortage of personnel is concerned to the Congress of the United States?

A. I certainly do, yes, sir.

Q. What are the facts in that regard?

A. We definitely have made our plight known, and, of course, one thing that enters into this is the present package that the President has submitted concerning the alien situation in the United States.

Q. I was going to inquire about that. Go ahead and expound on it.

A. Well, this, of course, in order to effect a package of this type, would require additional resources in order to do it. Now, of course—.

Q. What has the President proposed, in essence?

A. Well, he has proposed, initially, that employers who knowingly hire illegal aliens would be subject to a penalty. He has proposed that aliens who entered the United States illegally prior to January of 1970 and have remained here since that time would be granted permanent residence—.

Q. Permanent residence or citizenship?

A. Well, it's permanent residence. The newspaper used citizenship, but permanent residence is always a prelude to citizenship. They don't get citizenship initially, just like all of the people that are naturalized in your court here. They have to come in and meet certain residential requirements after they have come into permanent residence before becoming a citizen, and this is the same thing in his package. They become permanent residents, and then with the appropriate residence, they can then apply for citizenship. Then those who entered between January of 1970 and January 1st, 1977, would be given temporary residence,

which is something new. We have never had a status of the type that he is referring to in that particular category, and this would be limited to five years, according to the initial program, and also included, which it gets into the budget area, is increased personnel to enforce immigration laws.

Q. Is this in the form of legislation presently pending before Congress?

A. No, sir, this is a package that the President has presented, and Congress will be holding the various hearings on this before it gets to the point of any action on it.

TESTIMONY OF MICHAEL P. McANDREWS

[page 167]

Q. During your employment here in Tyler as a counselor approximately how many persons do you see in the course of a week or a month or whatever you are comfortable with?

A. On a monthly basis we attend anywhere from ninety-five to a hundred twenty-five.

Q. Are these people that you see for purposes of counseling with regard to their legal status in the United States?

A. Approximately, I would say, one-third of those people are persons who are coming in for immigration counseling.

Q. Do you have familiarity with the immigration or the status of the named plaintiffs in this litigation?

A. I really am not at liberty to say, due to the fact that

any immigration counseling is kept completely and totally confidential.

Q. As a result of recent changes in the law, have you encountered here in Tyler in the course of your counseling people who have no chance to upgrade their status to permanent resident aliens?

A. Yes, the majority of our people that, you know, are here without papers are in that category.

Q. Why is that? Why can't they upgrade their status?

A. Well, basically, it's just as Mr. Chambers has said. There's just nothing under the law at the present time. We have the immediate relative section, and we also have the preferences, and these people do not fall within the immediate relatives, and they do not fall within the preferences; therefore, their only hope is some type of a special program given by the President and Congress.

Q. Are the special programs of the sort that you're talking about a very common occurrence?

A. No, they are not.

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Q. If the parents of the plaintiffs were to go directly to the Immigration and Naturalization Service and make an application, would they thereby reveal that they are in an illegal status here within the country?

A. That is right.

Q. What would be the likely result?

A. The likelihood of this would be that they would counsel them as to whether they could apply under the

law, and if they didn't apply under the law, they would be given voluntary departure notices.

Q. Is there the possibility that they would be deported?

A. Yes, they would be given a certain amount of time to leave the country.

Q. If, on the other hand, they left the country and then made application, how long would it likely be before they could get back into the country, assuming they could at all?

A. If they applied under the law, it would be the same thing as if they were here. There would really be no difference.

THE COURT: All right, you may stand down.

(WITNESS STANDS ASIDE).

TESTIMONY OF MR. JIM PLYLER

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Q. Do you have the exact date? There seems to be some confusion.

A. It was the July Board meeting, and I was out of town.

VOICE FROM THE AUDIENCE: 21st.

A. July 21st.

Q. Is it your understanding that this policy was adopted pursuant to Section 21.031 of the Texas Education Code?

A. Yes, sir, that's correct.

Q. Could you state the number of children – I realize estimates are probably the best to be done – who are within the Tyler Independent School District who are directly affected by this policy?

A. It would be strictly an estimate. I have no way of knowing. We figure about between thirty and forty.

THE COURT: That's children?

THE WITNESS: Children, yes, sir.

Q. Now, under your interpretation of this policy who is required to pay tuition?

A. Any illegal alien that resides in the district that attempts to enroll in school.

Q. Could you tell me how the figure of $1,000.00 per year tuition was established?

A. Yes, we divide the general operating budget by the average daily attendance, and that figure is the cost per student per year.

Q. So that's the number of students divided into the total budget?

A. The average daily attendance divided into the expenditure, general operating budget.

Q. Does the reduction of one child from the Tyler Independent School District mean that the school district will have a cost of less – the budget will be able to be decreased by the sum of $1,000.00?

A. I don't believe I understand your question.

Q. The question is that you have allocated $1,000.00 per pupil per year for tuition. The question is that if a pupil is withdrawn from the school district, does that mean that the school district will thereby save $1,000.00?

A. No. Now, we don't figure the budget in that manner. The budget total is determined by the auditor at the close of the school year, and by dividing the average daily attendance earned by the students enrolled in the district, it determines the cost per student.

Q. There are within the school district certain fixed costs that unless there is a substantial reduction in the enrollment would remain, is there not?

A. That's correct.

Q. One of the largest expenses in running a school district, I assume, is the teacher salaries. Is that correct?

A. That's correct.

Q. Approximately what percentage of the annual budget does that constitute?

A. About eighty percent.

Q. As a result of this policy adopted by the Tyler Independent School District, have you been able to reduce your teaching staff, though?

A. No, sir, we have not reduced the staff.

Q. Of your total budget what is the approximate percentage of money that comes from local sources, from state sources and from federal sources?

A. About thirty percent from local sources, about sixty-

seven percent from state sources, and it varies one to two percent from federal sources.

THE COURT: Well, do you get any aid from the federal government that is not reflected in your budget?

THE WITNESS: Yes, sir. Under our program for disadvantaged youngsters. That figure is the one or two percent, and I was trying to figure it in my head, because, ordinarily, it is not part of the regular general operating budget. It is over in another section.

Q. Could you state in your opinion why the district adopted the policy that is here in question?

A. Yes, sir, when this law went into effect, 21.031, in 1975, there were very few illegal alien children in the district. There were a few, and I guess I was soft-hearted and concerned about the kids, not wanting to penalize them for something the parents had done, so we did not implement the law in '75-'76 or '76-'77, but then the numbers began to increase considerably, and as a result of that, it did begin to cause some problems in overcrowded facilities, so it was in my opinion that we must implement the law to prevent Tyler being a haven for families moving into the district to get an education.

Q. The way the policy is implemented there is no effort to admit those who are tax contributors and to exclude those who are not. Is that correct?

A. No, sir, their status as a citizen or illegal alien determines that.

Q. In your experience in the district and in living in Tyler, of the illegal aliens in the City of Tyler, what is their general economic status?

A. I would have no way to know that, counselor.

Q. Well, as a citizen here and as an observer for at least eight or nine years as Superintendent, would you have any opinion as to whether parents of illegal children would be able to afford $1,000.00 tuition?

A. I think it would be very difficult for them to pay the tuition.

Q. Have, indeed, any undocumented persons tendered the tuition?

A. I'm sorry?

Q. Have, indeed, any persons who have been found to be undocumented – have any of those persons tendered the $1,000.00 tuition charge?

A. I am not aware of that. The Personnel Department handles that.

THE COURT: Let me inquire, do you feel you would have been notified had one tendered the money?

THE WITNESS: Ordinarily not, Your Honor. That is another division.

MR. HARDY: May it please the court, would the court like me to elaborate or answer that question?

THE COURT: Yes, I would be very pleased.

MR. HARDY: Yes, there are illegal aliens paying tuition.

THE COURT: How many?

MR. HARDY: At this time we know specifically of two.

BY MR. ROOS:

Q. With respect to procedures in implementing this policy, could you describe what efforts were made to inform parents that the policy existed?

A. Yes, I know that in the spring some principals, some of our visiting teachers, some of our bilingual people began to contact Hispanic-origin people, trying to explain this policy to them in the hopes that they would initiate whatever was necessary for them to meet the policy, and then in August some of our principals made home visits, visiting with these parents who they knew were illegal aliens from the year before.

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Q. If the approximate thirty or forty students were put into the Tyler School District at this time, what effect would that have on the education to other students that are presently there?

A. Not knowing where they reside, it would be difficult for me to answer. If many of them were located in one elementary school district, it could mean that we would have to add additional teachers.

Q. As far as their impact in the classroom, it has been your experience, has it not, that most of the illegal alien children are of limited English-speaking ability?

A. This is true.

Q. They qualify for bilingual education. Is that right?

A. Well, they qualify provided there are as many as twenty in one grade level. We do not have that enrollment at this time. We do provide special instructions for youngsters of limited English-speaking ability.

Q. So they would be put in a classroom with the English-speaking students and, although you do provide special training – and I'm not saying English speaking and differentiating on that basis, but I am differentiating on the basis of illegally admitted aliens and citizens. The attention that would normally go to those students would in part now be given to the illegal aliens that are in the classroom?

A. That is correct.

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EXAMINATION

BY THE COURT:

Q. Superintendent Plyler?

A. Yes, sir.

Q. Do you know whether or not other schools in this immediate vicinity have implemented the statutory policy enunciated by the Legislature in the form of this legislation?

A. No, sir, I do not, Your Honor.

Q. You don't know whether, for example, over at Athens or Jacksonville they have adopted regulations similar to your own?

A. No, sir, I do not.

Q. What is the total enrollment of students in the Tyler Independent School District approximately.

A. Approximately 16,000.

Q. And what is your total budget?

A. 18.5 million.

Q. Are there are any other classes of children who are required to pay tuition?

A. Yes, sir. Students who transfer from districts contiguous with the Tyler District. If there's a course offered in the Tyler School System that is not offered in another, they pay the difference in what the state pays and what the local district pays.

Q. That's the only tuition that is paid?

A. Yes, sir, that's correct.

Q. Well, are there any children from outside the Tyler Independent School District who attend the schools without tuition?

A. No, sir.

Q. Has there been any effort made to distinguish what the incremental cost of placing these children in school is? What would be the incremental cost for these thirty or forty additional children?

A. Your Honor, I don't know. That hasn't been looked at.

TESTIMONY OF MR. WAYNE KILGORE

[page 203]

Q. In your efforts to enforce this policy statement that was adopted this year it was not just to persons who were being first admitted this year that you were seeking to enforce the policy, was it?

A. We were seeking to enforce the policy, of course, as it was written. Special emphasis did take place because it was a new policy. When a new policy occurs, of course, well then, there's some special emphasis.

Q. But there were students who had attended school in the past before the policy had been adopted who were, in fact, illegal. Is that not correct?

A. That is correct.

Q. Did not the policy throw upon your shoulders the obligation of finding those students and informing them of the new tuition charge?

A. Yes, I think the policy would indicate to us that we did have this kind of feeling thrust on us, yes.

Q. Now, what process was undertaken to identify those students who were already enrolled who might be illegal?

A. In March and April of the last school year we attempted to find out numbers, to find out precisely who might be in the category of not having official documentation. We have about 340 Hispanic students in the school district.

THE COURT: How many did you say?

THE WITNESS: 340.

THE COURT: Hispanic students?

THE WITNESS: Uh-huh, of Hispanic origin.

A. Out of this 340 about ten percent were found to be lacking documentation, lacking legal status in our school district. In the process of discussing this, principals and in some cases people who had some ability in the Spanish language discussed the situation last school year toward the end, indicating that state laws had been changed. Policies were discussed, and that if at all possible, it might be wise to attempt to secure whatever legalistic documents were needed.

TESTIMONY OF MIRIAM J. JOSEPH

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FURTHER TESTIMONY PRESENTED BY PLAINTIFFS:

MILAM J. JOSEPH,

a witness called by the plaintiffs, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ROOS:

Q. Please state your name for the record.

A. My name is Milam J. Joseph.

Q. And you are a Catholic priest. Is that correct?

A. That is correct, sir.

Q. And what is your position with respect to the Catholic schools here in Tyler?

A. Well, I am pastor of the Immaculate Conception Parish, which means that on the local level I would be termed the Superintendent of the local Catholic school system, not to be confused, however, with the Diocene Superintendent of Schools in Dallas.

Q. Could you describe the extent of the school system that you superintend?

A. We have a school system from kindergarten through the twelfth year. Saint Gregory Elementary School is K through 6, located on South College. T. K. Gorman Senior and Junior High School on the Loop is from the seventh years to the twelfth year. It is a coed school, accredited school under the Texas Education Agency.

Q. Now, with respect to the elementary school for the moment, what is the size of the elementary school in terms of students?

A. I'll have to add here. In Grades 1 through 6 there are 189 students, I think, if my addition is correct, and in Kindergarten -- there's a total of 217 students.

Q. Now, have you had an opportunity to compute whether you have space available in the different grades at the present time in that school?

A. Sister Terez, who is the principal of the elementary school, we have talked about this on various occasions, and the latest figures are as follows:

In this first grade there are 33 students, which means there is no capacity for anyone in the first grade. The same is true in the second grade, 33 students. It is above capacity. In the third year we could take one child. There are 29 students. We could reasonably take one child. In the fourth year we could

take two children. There are 33 students. We could go to a capacity of 35. In the fifth year we could take one child. There are 34 students. In the sixth year there are 32 students, which gives us added capacity of 3 children.

Q. Father, is there a tuition charge for attending the elementary school?

A. Yes, there is a registration fee together with a tuition charge. The tuition charge is, well, there are various ways that we do this. There is a set tuition charge of $50.00 a month for the first child and $25.00 a month for the second, third, or fourth child in any particular family. If a person is a non-parishioner, their charge is $75.00 a month. This is computed over a twelve-month period.

Now, I must be fair in adding that in any and all situations there is a certain negotiation that takes place with regard to ability to pay, so the point that I would make is that there is a tuition charge. If one is unable to pay it, we negotiate.

Q. I would imagine that you cannot take too many non-paying students. Is that a correct assumption?

A. Well, if we had all non-paying students, then we would be out of business, and the Immaculate Conception Church -- and this isn't any advertisement or anything -- but we subsidize the school system $140,000.00 a year. That's why the tuition that a parishioner would pay would be less than a non-parishioner.

Q. Now, with respect to the high school, have you computed capacity figures at the high school level?

A. Yes, our high school, according to the schedule that we follow now and the manner in which we conduct our classes, has a capacity of 240 students. We now have 225. Our smallest class in the high school is the senior class, which has 26 students. Then we could reasonably take 15 more students, provided they were in the right classification.

Q. You know you have an under-capacity as for seniors at the present time. There's space available?

A. That's correct.

Q. What about the other grades?

A. All right, we could take 2 students in the seventh year. We could take 9 students in the junior and senior – excuse me. Let me start over again.

We could take 2 students in the seventh year. We could take 2 students in the ninth year. We could take 7 students in the tenth year. We could take no students – we are oversubscribed in the junior year.

Q. Is the tuition the same amount in the high school, or is it different?

A. No, it is more in the high school. Generally speaking, it costs one-third more to educate a junior and senior high student than it does an elementary school student, so our cost in the high school for a parishioner is $60.00 a month for the first child and $40.00 a month, I think, for the second, third and fourth, and $100.00 a month for a non-parishioner. That does not include the books and the course fees. Once again, it is fair to say that we do negotiate on our tuition, particularly, with parishioners.

Q. There are some bounds, I would gather, ordinarily, because of the considerations we previously mentioned?

A. Yes, there are. There are some bounds.

MR. ROOS: May I approach the witness?

THE COURT: Yes.

(REPORTER'S NOTE: Counsel and the witness here confer out of the hearing of the court reporter.)

Q. Just one further question, Father. You mentioned that there was a registration fee. I guess you mentioned it primarily when we were talking about the elementary school.

A. And in the high school, a $60.00 registration fee.

Q. Is that per pupil?

A. Per student, yes.

CLOSING ARGUMENT OF ATTORNEY CARDWELL

[page 232]

STATE DEFENDANT'S CLOSING ARGUMENT

MS. CARDWELL: I don't have as much to say as it looks like. I have just got a lot of notes.

Let me first address the preemption argument. I think if this court reads De Canas versus Bica, they cannot possibly hold that there is preemption in this case. They have tried to distinguish De Canas, but it is not distinguishable.

Education, like employment, has always been of local and state concern. 21.031 only regulates education in the State of Texas. It is not a federal concern, and it never has been. Rodriquez held that it was of state and local concern. They say that the enforcement of the statute is aimed at the alien. Well, the enforcement of this statute happens to be aimed at the Tyler Independent School District, because it is the Tyler Independent School District that does not collect money, because these children cannot be included in the ADA, so they don't collect money for them, so if they're in school, the money comes out of the Tyler Independent School District's pocket. It doesn't come from the state treasury, and the point—.

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are extending protection to the illegal alien, why don't they just say alien? I think there is a reason for always saying legal alien when you're talking about equal protection, as opposed to illegal alien.

I think that we have not only a rational basis behind our statute but probably a compelling state interest, and it's not an effort to control. Immigration is an effort to provide some standard of education for the citizens and legally admitted aliens that are already here. The portion of the 230,000 illegal aliens in this district, I think, is only a small portion of what is in the state, as indicated by some of the questions by plaintiffs' counsel. As you go farther south, in fact, it is much greater, and the impact on many schools would, in effect, put them out of business.

Our rational basis, our compelling state interest is in providing education for citizens and the legally admitted aliens, those that are here and those that we can take care of. It's a choice between providing good education for some or substandard education for all.

There will be problems of planning. There's no way to really know where they are and who they are. They're transient. They move in and out of the school system. It would put a great burden on the bilingual education program, and I think, in effect, it would inundate our school system to a point that we would be providing ineffective education for our citizens and legally admitted aliens.

THE COURT: Let me ask you this. Haven't you by your questions to the Superintendent and by his answers indicated that it is the policy of the Tyler Independent School District to deter illegal entry by means of this regulation?

MS. CARDWELL: I didn't. I didn't. It is not a policy of Tyler to deter illegal entry. There's nothing about any statute we have, I think, that affects entering this country.

THE COURT: Well, I thought you made it quite a point in your interrogation of the Superintendent and by his answers that this would act as a deterrent to illegal entry. Am I wrong about my interpretation of that?

MS. CARDWELL: I don't think I asked the Superintendent anything at all about—.

THE COURT: Well, maybe it was your co-counsel who asked those questions.

MS. CARDWELL: Are you thinking about my questions to chambers where I asked him if he thought that we encouraged or discouraged immigration into the country by the present statute and if, in fact, we allowed it, it would be a clear indication we would?

THE COURT: Well, I want to know what is your interpretation of that series of questions that you asked him.

MS. CARDWELL: Well, I think it is his opinion that people don't really at this point -- are not, you know, discouraged from coming to the state because we don't give them education. They come for employment, so that doesn't really make any difference, but there are probably some who, if they thought they could get a free education would come for that purpose too, and that would encourage. The statute as it is now---.

THE COURT: Looking at it from the reverse standpoint, this would have the effect of discouraging.

MS. CARDWELL: Well, he says as it is now, he does not think it affects immigration either way, but there are people who would come for that purpose. As the statute is now, I think any impact it would have is extremely speculative and very far removed, just like in the Bica case in California. We don't actually affect, as we are now, immigration into the country. They're coming for jobs, and they want jobs, so they're not really interested in the fact that their children are not going to get an education. That's not a deterrent to people that are coming into the country.

THE COURT: Well, we have here a suit by these very people that you're talking about.

MS. CARDWELL: But they want a free education. They have been successful in evading Immigration, and they would like to have a free education. Sure, I would like to have a free education too, but it, obviously, doesn't kee them out of the country, because they're here.

THE COURT: All right, thank you.

You may speak.

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CLERK

JOINT APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

* * *

NO. 80-1538

* * *

JAMES PLYLER, Et Al.
V.
J. AND R. DOE, Et Al.

* * *

NO. 80-1934

* * *

STATE OF TEXAS, Et Al.
V.
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et.al.

VOLUME B

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PLYLER V. DOE: RECORD OF PROCEEDINGS TRIAL ON THE MERITS, DECEMBER 12, AND 16, 1977

TESTIMONY OF GILBERT CARDENAS

[page 16]

Q. Dr. Cardenas, have you had an opportunity to study the historical treatment of Mexican migration to the United States?

A. Yes.

Q. Could you briefly describe the historical overview of this process?

A. I'll try to be brief. I think from my standpoint and from the work that I have been able to see and study I find three major areas that we could identify for this historical sketch.

One is the historical role of immigrant labor in the United States as one of the salient issues pertaining to the migration of Mexicans to the United States. The other is a cyclical pattern in which workers have been imported and deported from this country, primarily Mexican workers, and the third is the desirability for Mexican Nationals to work in the United States and not to become settlers, and this policy in a sense can be construed as U.S. immigration policy toward Mexico.

In 1911 the Dillingham Commission published a report, a series of reports, fifty-two volumes, a study on emigration to the United States, and this study concluded that Mexican workers were desirable as laborers but not settlers, and this had a lot to do with

the assumed alleged biological inferiority of the Mexican National. There's a great deal of concern about the racial composition of the population at this time, and many people, particularly in the State of Texas, were also concerned about the homogeneity of the native stock and were opposed to the incoming migration of Mexican workers.

On the other hand – this is in the 1910's – you also have the rise of various types of industries, particularly in agriculture, large-scale agriculture, the railroad industries, the transportation systems that were being developed in the Southwest. These two interests clashed. On the one hand, employers wanting to import Mexican workers and trying to work out ways by which Mexican workers could otherwise be brought into the country, and then the racial concern, the racial attitude against Mexicans. This clash was finally resolved by the United States Department of Labor through the institutionalization of the temporary contract worker program. This continued until 1924. In fact, something like a hundred thousand Mexican workers were imported on a temporary basis to work in U.S. agriculture, particularly in Texas and the Midwest, and expected to return back to Mexico. This satisfied the persons who were concerned about the racial composition of the population, and yet, also satisfied the employers who were seeking to utilize Mexican labor, because it was allegedly cheap and more manageable.

This I argue through the work that I have done has been the foundation point of all U.S. emigration policy to Mexico. We repeated this in 19 – well, actually, in the thirties but in the reverse situation. After the numbers of immigrants had continued to accumulate in the country legally and illegally during the depression, large numbers, perhaps one-sixth of the total Mexican population were deported or otherwise sent back to Mexico.

In World War II, just as in World War I, there was another great demand and a need for immigrant labor. Mexicans were, in turn, sought after for the importation of more workers, which was also to become a temporary work program, but, in effect, became a – actually starts in 1942 to 1964 – and went beyond the war, and virtually thousands and millions of Mexican workers were contracted to work in the United States temporarily and sent back after the work was completed. In 1954 we had the large-scale deportations in Operation Wetback of excess numbers of immigration workers that had been here. In many cases, as in the case of the 1930's, in 1954 many people who were deported were also legal U.S. citizens, that is, their children were born here in the country during the time that the immigrants were working in the country.

Now, what this tells us is that there have been many interests, employer interests, and interest within the United States government and within the state governments in utilizing Mexican workers. Yet, there has not been a corresponding interest in providing Mexican workers the same opportunities that the immigrant workers had from Europe to remain and to settle in the country, and this policy, in effect, by extending employment to the Mexican workers of the United States without providing the legal machinery by which they could either adjust their status and become legal permanent residents, in effect, extended the border all the way to Mexico. We have the formal border, but in terms of our practices and historical interests in utilizing Mexican workers, this border has been very flexible.

Q. Dr. Cardenas, in the course of your work have you had an opportunity to observe whether or not this trend continues to the present day?

A. Well, in my last field work experience last month in El Paso I had an opportunity to visit the United States Border Patrol office and talked to some of the border patrolmen, as well as to visit the border line right outside the metropolitan area of El Paso, and I was surprised to see the same practices being continued in the sense that we saw people walking across the border, walking across the river, which is only about eight feet wide and very shallow, coming in and hitchhiking into the city to work. We saw on one occasion up to twelve persons walking with virtually no efforts to apprehend them, no border patrolmen in the area.

In effect, the same practices are being continued today as they were in the 1969-1970-'71 period in which we did our field work. We had the same observations at that time. I was particularly struck in light of the attention given to the magnitude of the problem, allegedly stated, with regard to the influx of the illegal aliens that there was no diligent efforts to control the border.

Q. Have you observed in your work a history of discrimination against Mexican aliens in activities with Mexican aliens?

A. There have been many references to this in the literature, and the field work that we did in the 1969-1970 period – I think to put it into perspective and to talk about discrimination against Mexican aliens, Mexican Nationals, we have to really look at the relationship between all Mexicans in the United States and other groups, and, particularly, what we call Anglos, and the State of Texas, I think, perhaps has the most notorious history in adverse relationships between these two groups, this history starting from the Texas Revolution, the hostility generated after the Texas Revolution, United States and Mexican War that was settled in 1948, the hostilities that generated after

that war between Anglos and Mexicans in the country, the various border skirmishes that have developed and continued up to 1912, the lynchings of Mexicans in the State of Texas.

I think – I don't think – I know there are more lynchings, in the State of Texas of Mexicans than anywhere else in the country. This is, I think, illustrative of that adverse kind of relationship and, in particular, Mexican Nationals being more vulnerable, particularly if they have no papers, more susceptible to this type of treatment, but from their perspective and from the work that we are able to uncover most of their complaints centered around loss of wages, where workers would be hired by employers to work in agriculture and in some cases industry, were brought in to work for two or three weeks, and at the time when they were supposed to be paid, the employers all of a sudden discovered that they had Mexican Nationals, so the would call the Border Patrol and have them rounded up. Well, in the large-scale mass-type roundups there was very little provision to collect back wages and personal belongings of these undocumented workers, and this has been the principal complaint that the Mexican Consuls have received and the same types of complaints that we were told by the workers, particularly in the detention centers, so that has been their major criticism that they related to us.

Q. So you in your work have had an opportunity to discuss complaints with detained Mexican aliens?

A. Yes.

Q. Based on your research, could you describe the general characteristics of the undocumented Mexican population in the State of Texas?

A. The undocumented Mexican population in the State of Texas from the work that we did in 1969-1970 were very similar to the characteristics of legal Mexican immigrants in that they are generally young, single workers, former landless agricultural workers in Mexico. They are generally here on their own. If they are married, and spouses do not normally accompany them in their migration to the United States, their children also, if they have children, in many cases some of the children being born in the United States, if their spouses happen to be with them, generally were not with the immigrant workers in the studies that we did in the 1960-'70 period, and, more recently, I had an opportunity to study the influx of legal emigrants from Cuba and Mexico with Alexandro Portes, and the data that we have been looking at also shows that most of the workers who are here were formerly illegal aliens. It was something very significant in our work, like fifty or sixty percent of the sample had previous residence in the United States prior to legal admission.

In fifty-one percent of the sample their eldest child had been born in the United States, so many of these new legal immigrants are former illegal aliens, undocumented workers, and, therefore, many of them have children who were born here.

Q. In your work what have you found to be the primary motivation for Mexican migration to the United States?

A. Primarily economic, the desire on the part of the U.S. employers to extend employment opportunities to Mexican workers, the efforts of the United States government to realize this desire in the various programs which I outlined in the first part of my testimony, and the absolute destitute situation that the Mexican workers find themselves in in Mexico.

In many cases the illegal today were the children of the *braceros* of yesterday, and this is what I mean in terms of that dependency that has been established to work in the United States.

Now, there's never or rarely a situation where the needs of the Mexican workers are compatible with the needs of the U.S. immigration policy. At times when it is conducive to our interests to be permissive regarding the border for the influx of Mexican workers, and then when it's to our interest to close those borders, the Mexican worker is still in need. Having worked here before, he has no alternative but to seek further employment in the United States, if possible.

Q. During the course of your work have you discovered whether or not a significant portion of the undocumented Mexican alien population avails itself of the social services available in the United States?

A. Yes. The work that I have encountered, the available evidence that I have been able to locate, in three studies, in particular, one by Wayne Cornelius, which is a study in Jalisco, Mexico, in the various communities, asking the sample of residents questions regarding the migration history to the United States, and questions were asked regarding the use of services in the United States, and most of the aliens reported that they did not utilize formal resources. Most of them reported that they did not utilize, for example, the health clinics and hospital facilities in the United States. Most of them reported that they did not utilize legal services, and the conclusion that Cornelius drew on the basis of his study was that they were not utilizing the government benefit programs or formal services.

In our studies of 1969-'70 we found that aliens, in particular, undocumented workers have a tremendous

fear of institutions because of the possibilities of them being identified as illegal aliens, and they preferred not to use these services. On the other hand, there is not a tradition in Mexico in terms of welfare, in terms of the large-scale welfare programs we have in the United States, so, therefore, undocumented workers aren't orientated (sic) towards welfare-type programs that might be, for example, comparable to native Americans who were born here and have grown up utilizing U.S. institutions.

The other study by Vic Villapondo in San Diego under the County Board of Supervisors, they did a study on the use of formal services there and found essentially the same thing that Cornelius found, that they were not utilizing these services

The other study by Jorge Bustamante in 1973 also reported that these are returned immigrants who had been deported or otherwise removed from the United States. He interviewed them after they were returned to Mexico and picked out a sample of a hundred nineteen persons, and on the basis of interviewing these returnees found that ninety-six percent of them did not utilize the services, the health services, the clinics or hospitals.

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Q. What about the mobility of these individuals?

A. It depends. On the border in the areas that *are contiguous, that is, between the United States and Mexico, there is a great deal of what we call border running, people just on the basis of employment or further reasons would continually cross the border and return.*

Q. Day laborers coming over for the day?

A. Day laborers, or they could even be perhaps longer time entrants in that they might work in an area close to the border for a period of two or three weeks and return back or for a period of two or three months, but the further we got from the border, the greater likelihood there is for the workers to remain on a more continuous basis in the United States, that is, in terms of continuous residence. I think this is true, for example, between McAllen, San Antonio, Dallas, Chicago. The further away we get from the border, the more we're talking about the more integrated type immigrant worker.

Q. Are a great number of these workers the type that follow seasonal work, be that work in the fields or harvesting or something like this?

A. In the past that has been the experience. The book that I referred to on *Los Mojados* primarily dealt with agricultural migration. That had been the major work in which workers had been recruited. Since 1970 there's been a shift – agriculture is still important, but more workers also are moving into other areas of non-agriculture pursuits.

Q. What would you estimate those percentages to be?

A. I would still think that perhaps seventy percent are still in agricultural pursuits. That's just a guess.

Q. I understand. Based on that seventy percent, would you say that seventy percent of the illegal aliens that come within the borders of the United States are on a constant move?

A. Well, if they're in the State of Texas, they would move with the crops, if that's where they are at, but if they're on the border or in South Texas, their mobility is not that great; that is, they pretty much stay along

areas that are contiguous to the border. That's where the majority of agricultural workers are at that come into the State of Texas. These are, in effect, very often border running people too, so if we're talking about mobility, we're talking about constant crossing of the border.

Outside of South Texas I think this number rapidly declines, since the number who are in agriculture is opposed, I would say, to a more stable type of migrant.

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Q. In your research have you encountered instances where maybe the father or a head of a family would come into the country and work for a period of weeks or maybe months and *then have the money to bring his family into the country?*

A. *There's been many reported instances where that's occurred, yes. I don't have any data to show to what extent that is the case,* that is, on the basis of the studies we have done. My feeling is that it still continues. My suspicion is that it is not very great in terms of the overall number of immigrants who are in this country and working. The general pattern has been that even when they legalize the status, they still have the tendency to bring their spouses to the country.

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Q. In regard to the fifty-one percent factor you spoke of who were formerly illegal aliens and are now legal aliens —.

A. Yes.

Q. -- these were aliens who had become legally admitted who were not under some special work permit in terms that they had a particular skill, like they were a doctor, that allowed them to come into the country. Isn't that right?

A. Right.

Q. So they were just your average worker who had become a legal entrant?

A. Most of them had adjusted their status, or perhaps were on waiting lists and had visas or on the list for visas with applications and had been in the country working, and when the time for the visa was granted, they just picked them up and came across legally. We don't have a great deal of information because of the nature of the segment in which we did the surveys, and we didn't have time to probe, you know, and get into those types of questions.

Q. Well, all in all, is it fair to say that the main reason that the illegal Mexican alien is present in Texas is for jobs.

Q. THE COURT: Is what?

Q. For jobs, for money, better salary?

A. Yes, they are here because they are in need. They are poor in Mexico and for years there has been a pattern where American employers -- as I pointed out, the American government has supported immigration of Mexican workers and extended employment opportunities for the Mexican worker, and they, in effect, have created a dependency situation where workers now are dependent upon employment in the United States for their livelihood. This may not have been the case if

we had a different policy years back. From my perspective and the conclusions that I have drawn on this question, had it not been in our interest to utilize Mexican workers, we would not have the same problem that we do have today regarding the undocumented worker. In effect, I argue that the decisions made in Washington are more important in explaining the migration and status of Mexican workers in the United States today than the decisions made in Mexico City, that is, in terms of our policy, our permissiveness and our desire to utilize Mexican workers in the United States.

In effect, I assign the major responsibility to the United States. There's a tremendous amount of poverty in the world. Yet, this poverty doesn't always affect us, because we don't let it affect us, but to the extent that Mexican workers were utilized and were easily exploitable, to that extent, very few people were concerned about the migration and entrance to this country.

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Q. I may have asked you this, but in the thirty percent that you said are shifting to cities, don't they, while they are going to where jobs are available, don't they generally try to get into the Mexican-American enclave? Isn't that where they most often are found where there's a legal Mexican-American?

A. Yes, we call that in the cluster hypothesis. It may not be just on the basis of nationality. It could be on the basis of language. *Where there's a Spanish-speaking community, this would be a place where, again, given the kinship ties, perhaps, or informal networks, this is the place that they would choose to reside and very often might be the only place they could afford to live.*

The Mexican-American is generally situated in poor areas of town, and this might be a place where, really, there's no alternative but to live in that poor area.

TESTIMONY OF MARION HOUSTON

[page 60]

Q. Somewhat summarizing your testimony, I gather that you would have noticed with the previous witness that at the present time there is really no solid, adequate, scientifically valid basis for making any real estimates as the number of illegals that are in the United States or in Texas.

A. I was going to get to one that's just come out, O.K.? Although it's a very crude estimate, it is a scientific estimate. It is based on good, scientific methodology, data different from apprehension data. I have not analyzed it fully. It's a very heavily statistically oriented sort of argument, but in the last couple of months Lancaster and Scheurer of H.E.W. and Social Security Administration have done an estimate of the number of illegal aliens between the ages of eighteen and forty-four in April of 1973, all right? This is based on the 1973 C.P.S. – that's current population survey, and I.R.S., Internal Revenue Service, and Social Security Administration exact-matched study on the basis of their analysis of that exact-matched study. They have come up with an estimate of 3.9 million illegal aliens in the United States between the ages of eighteen and forty-four in April of 1973.

Now, they offer that as a crude estimate, not of itself, but that is the best piece of work that's been done on this question at this time.

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Q. Could you briefly describe the characteristics of the Mexican illegal immigrant?

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A. Fortunately, the data on characteristics on illegal aliens are much more reliable and, indeed, increasing in the last couple of years than any kind of data on either the numbers or geographical distribution of illegal immigrants. There have been a number of empirical studies. None of them are definative. All of them, however, show a remarkable degree of similarity in their findings. Some more, for example, this 1969 study -- the Mexican government has done two studies of apprehended illegal aliens, one in 1972 and one in 1974. The major piece of work thus far, although there will be two new studies coming out in the next year, which is the North-Houston study of seven hundred ninety-three apprehended illegal aliens, which was done in May of 1975, and I would use this as the basis.

This gives us the most of the data that we now have that is available on the subject---.

Q. If I may interrupt---.

A. Yes.

Q. ---before you go to that, you were a co-author of the North-Houston study?

A. Yes.

Q. Please proceed.

A. We interviewed seven hundred ninety-three illegal aliens in 1975. All of them had been apprehended by the Immigration Service. All of them were interviewed only if they had worked for two weeks in the United States labor market, so our population by definition were reflected as workers. Our findings are similar to other findings on Mexican illegals. Unlike other surveys on Mexican illegals, we had both four hundred eighty-one Mexican respondents. We also had two hundred thirty-seven non-Mexican Western Hemisphere respondents, and we also looked at seventy-five Eastern Hemisphere respondents, and also looked at seventy-five Eastern Hemisphere respondents, and we found the characteristics of these three different groups very similar in recent origin, Mexico, non-Mexico, Western Hemisphere and Eastern Hemisphere, very different in their term of characteristics, less different, however, in terms of their run of the labor market.

I will now talk about the Mexican illegal alone.

Q. Please do.

A. Our respondents are cast more in the young, the average age of 28.5. That's consistent in all empirical studies of illegal aliens, primarily Mexican. Most of our respondents were male, more than ninety percent. That's likewise consistent with other studies. That's likewise likely to be an overestimate, because most studies are apprehended illegals, and the Immigration Service prefers to insure apprehended males. There's likely to be an overcount on that.

Q. Excuse me —.

A. Yes.

Q. The general conclusions are that a vast majority are males?

A. The great majority, in fact, it's so close that almost all. That's the distinction.

Q. Thank you.

A. That would be particularly true of Mexican illegals, because Mexican illegals are non-like un-Mexican illegals in that they tend to have entered the nation without documentation, which means that they have to specifically cross the border in a way that tends to select out women and, certainly, children, so that your Mexican illegal is more than likely any other group to be male.

I think that the majority of the Mexican aliens, less than fifty percent, were not married. The majority were, similarly, not likely to have children. They were almost invariably economically motivated. Their chief reason for coming to the United States was to find work, get a better wage. A Mexican illegal alien had a very high dependency ratio at home. They were supporting 5.4 dependents in their country of origin, which was quite different from Western or Eastern Hemisphere illegals, who were supporting only 3.6 or 1.8. Our Mexican illegal alien, like all other illegal aleins that have been sampled, were very badly educated and were unskilled workers in their country of origin. Further, less than a quarter of the Mexican illegal aliens of the sample spoke English, and, again, that's consistent with all the work on the subject.

THE COURT: Less than a quarter?

THE WITNESS: Yes, uh-huh.

A. Those are our chief findings on Mexican illegal aliens and are completely congruent with other data on the subject. There are two other characteristics of Mexican illegal aliens that may be useful to point out, and that is that they are voluntary migrants. That is, they're free migrants and, like all free migrants, they are generally acknowledged to be self-selected, and, therefore, the best and the brightest of any community, very typical of all free migration movements, of which the illegal migration is a new species today.

Q. Could you estimate the percentage of undocumented aliens who bring their families with them to the United States?

A. There are really no data on that specific question, whether or not an illegal alien brings his family. That's unlikely to be the case of the undocumented worker who would be crossing the border physically because of the method of travel. Your visa abuser who tends very strongly to be the non-Mexican illegal, would be more likely to bring family. That in itself, however, is very unlikely, given the fact that most visa abusers are tourists, and tourists are screened for the genuineness of their desire to tour, rather than working in the United States. It's unlikely for the State Department to issue a visa to an entire family of a potential illegal alien, so I would estimate in the area of speculation in terms of their function and in terms of the process of their admission, there would be very few illegal aliens who would bring their families – this would be a flow figure – who would bring their families to the United States.

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Q. Were you able to in your studies develop any average weekly wages that Mexican workers were paid and do any data analysis concerning any number of hours that they labored for those wages?

A. I don't have any weekly wage data for Mexicans besides the general $106.00 weekly wage. We compared our illegal workers with comparably employed U.S. workers, but we did not do it on the region of origin basis. What we found when we compared the weekly wage of the illegal respondents with the weekly wage which is available to comparably employed production non-supervisory workers, as the Bureau of Labor statistics calls it, we found that our illegals earned a weekly wage of $117.00, which is roughly two-thirds the wage of comparably employed U.S. production and non-supervisory workers of $160.00.

Although our illegal respondents earned only two-thirds the wage of the U.S. workers comparable employed, they worked an average of 8.6 hours more per week than the U.S. workers.

Q. Have you had any occasion to study whether Mexican illegal aliens pay Social Security and income tax?

A. We have some data on that subject. We found that out group of illegal aliens who were workers, that more than three quarters had their Social Security taxes withheld. Almost three quarters had their federal taxes withheld, that a surprising forty-four percent had hospitalization withheld, which means that forty-four percent were in some sense integrated into the economic mainstream. We found that 31.5 percent of the sample filed federal tax returns. There were very few differences between the Mexicans and non-Mexicans on this. However, we found a very close correlation between employer exploitation and whether or not our sample illegal aliens paid taxes, *i.e.*, had them withheld.

We found about a quarter of our sample – talking about the whole sample now – were not paid mini-

mum wage, *i.e.*, they had been subjected to illegal wages. We found that had been most likely to have happened in the border counties or in the Southwest. The Southwest were three or four times more likely than any other region in the nation to have their illegals to report a legal wage. To the degree of which illegal aliens in our sample reported substandard, *i.e.*, illegal wages and working conditions, they also tended to report that they did not have their Social Security taxes or federal taxes withheld by their employer.

Q. Did you have any opportunity to evaluate data from the sample of illegal aliens who had been employed in San Antonio, concerning their tax payment?

A. Yes, to our surprise, San Antonio was the highest of any – we analyzed our data in terms of cities and metropolitan areas. San Antonio reported the highest incidence of Social Security deductions than any other city. New York was the lowest in the U.S. with seventy-four percent.

THE COURT: Let me see if I understand what you said. They do report more in San Antonio?

THE WITNESS: To our surprise, sir.

THE COURT: Than in New York City?

THE WITNESS: Yes.

A. I think the reason for this was – this is speculation – that we had a fair number of Eastern Hemisphere dishwashers, restaurant workers in New York City. Restaurant workers tend to be an underground labor market, where you have illegal wages and working conditions, and, therefore, they tend not to have their Social Security withheld. One benefit illegal aliens

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Q. Do you have a figure on how many illegal aliens, particularly Mexican Americans or from Mexico, that are in the State of Texas?

A. I could give you a number if you want it. I would not wish it to be qualified as scientifically respectable, but I fooled around with some numbers the last couple of days, and I am very conservative on the question of the number of aliens in the United States, particularly, when you think about stock and flow. My own personal feeling, and I am sticking up my finger, you know, testing the wind, on this kind of thing. I would not want this to be regarded as anything except a reasoned opinion. I hope it is reasonable. It is certainly not scientifically grounded. My own estimate would fall in the range of four million illegal aliens. That's a little bit less than the unofficial Immigration Service estimate that's been included in analyzing the funding needed to implement the Carter Proposal. That's a very recent estimate on the part of the Immigration Service. They are now estimating if the Carter Proposal goes through that there would be about five million illegal aliens in the nation who would be eligible for temporary adjustment of status and at three-quarters of a million who would be eligible for permanent resident alien status. I think that's a little high myself. I am much more moved by Elwood Stodard, an anthropologist at the University of Texas, who has come up with an estimate, and, again, that in itself is a speculative sort of estimate, but to me it sounds right given other calculations. He estimates that between 2.3 million and 3.1 million illegal Mexican aliens in the U.S. that would put the median at about 2.7. I think that's probably a fairly reasonable estimate of the number of illegal aliens in a stock figure in the United States at the time.

THE COURT: He had asked specifically about the State of Texas.

THE WITNESS: Yeah.

A. Well, I can't get to the State of Texas until I get the national estimate. I'm giving you the national now, and I'll try to give you a reason how I come up with a figure for Texas.

Let's take that you find 2.7 million as your total national population of illegal Mexicans in the country now, O.K.?

If you do that, and if you assume that illegal aliens--like illegal Mexican aliens are like legal Mexican aliens in the nation, that is, in their geographical distribution, which is the most difficult kind of characteristic to determine, you can get a sort of handle on numbers at this point--people are beginning to--but when it gets to the next question, which is, "Where are they?" which is a very central question, obviously, for public policy, it becomes much more difficult. What I'm going to do is that I'm going to offer as a hypothesis a notion, and it is a reasonable notion, that illegal aliens tend to settle where legal aliens are. That is, the geographical distribution of legal Mexican aliens. If that is the case, then it follows that one-quarter of an illegal Mexican aliens are in the State of Texas, one-half in the State of California with one fourth in the State of Texas. The remaining quarter would be sprinkled in Arizona, the Midwest and Southwest.

If you're going to grant me all these assumptions, and there are many people who would take exception to each one of them, then you would come up with the figure, If I can find it--I think it's six hundred thousand illegal aliens in the State of Texas. That's not quite right.

Q. Are you taking your assumption of 2.7 million and dividing by four?

A. Right, I am. It's a very straightforward sort of estimate. O.K., yeah, six hundred seventy-five thousand.

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MR. HARDY: I would like a statistical breakdown of the illegal immigrant that she interviewed in Houston. I don't believe on direct that they came out with how many single or how many had families here or how many children were involved.

A. My name's Houston. I don't believe that anybody--.

THE COURT: She indicated that fifty percent of them, if I recall it, were not married, if I got her figures right.

A. Less than fifty percent of our Mexican illegal aliens were married, O.K.? 11.1 of our Mexican legal respondents (sic) reported that they had spouses in the United States. That's slightly more than ten percent reported that they had spouses in the United States. Half of the Mexican legal aliens reporting that they had spouses in the United States, also reported that they were green card carriers. Excuse me. Green card carriers are permanent resident aliens or resident U.S. citizens. That means that apparently about five percent had illegal alien spouses.

Similarly with the case of the children -- again, we're talking about Mexicans -- less than half reported children. Less than ten percent reported that they had children living in the United

States. More than ten percent reported that they had U.S.-born children, and 2.7 percent, that is, thirteen Mexican respondents, reported that they had one or more children in the U.S. schools.

THE COURT: Two point what?

THE WITNESS: 2.7 percent, sir.

THE COURT: Thank you.

Q. The data that you base your research on, did this separate the child that is born in this country to illegal alien parents versus the child that was brought into the country?

A. Our data are only what our respondents reported on children. We did not interview children.

Q. Have you found this group of people that are coming into the country illegally have a tendency to move about and not stay stationary for any length of time?

A. Well, the illegals in our sample had been in the United States for an average of 2.5 years.

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Q. When this group of people come into the United States, do they normally only look to the job opportunities that are available to them here, compared to what they have in their home country?

A. The outstanding motivation for illegal immigration today is better work and higher salary. It's a worker migration.

Q. Based on your studies and your experience, do you have an opinion whether or not education being offered to these people would be an incentive to come to this country?

A. Education offered to whom, sir?

Q. The children.

A. Very few tend to bring children. It's a migration of young male workers who support a high number of people in their country of origin---.

Q. Excuse me. I have asked you just to assume, would this have an effect in yur opinion on people? Would more people bring their children to this country or the State of Texas, specifically, if more opportunities were available to their children?

A. If the United States offered education to illegal children, would illegal aliens bring their children to get education? Is that what you're asking?

Q. Yes.

A. I suppose so.

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REDIRECT EXAMINATION

BY MR. ROOS:

Q. Just one question--you mentioned in your statistics that 2.7 percent, I believe, of the people you interviewed had children in schools.

A. Yes, that's correct.

Q. That does not distinguish between citizen children and non-citizen children, does it?

A. No, and since the number of respondents who reported U.S.-born children exceeded the number of respondents who reported children illegally in the United States, I would assume, although I do not know for certain, that most if not all of them are U.S.-born children.

TESTIMONY OF DR. ROBERT FIRESTINE

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ROBERT FIRESTINE

a witness called by the plaintiffs, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ROOS:

Q. Please state your full name for the record.

A. Robert Edward Firestine.

Q. And your present place of residence?

A. Richardson, Texas.

Q. Could you briefly state all degrees received from institutions of higher education and in what areas they were received?

A. Yes, I have a Bacholor's Degree in economics from Rensselaer Polytechnic Institute in 1963. I have a

Master's Degree in economics from Syracuse University in 1965 and then a Ph.D. in economics from Syracuse University in 1971.

Q. Could you briefly describe your major areas of specialization?

A. Yes. My major professional interests are in the area of educational finance, public finance, urban economic problems, and I have done some specialized work in declining enrollments in education.

Q. Could you briefly describe your employment experience as it reflects upon those specializations?

A. Yes. Most specifically, I was employed for three and a half years in the Syracuse University Research Corporation in the Educational Finance and Governance Center, where I was co-director. Most of that time involved studies of educational finance with respect to the federal government and state and local governments in the United States.

Prior to that I had done some teaching and some research at the University of Florida in economics, whicha had some relevance to educational finance, and since that time, that is, since September of 1975, I have been Associate Professor of Economics and Political Economy at the University of Texas Dallas, in which I have carried out some studies in urban problems with specific reference to educational finance and have done some professional writing in the area of educational finance and declining enrollments.

Q. Recognizing your vita is in evidence, and there's no need to go through all your publications, could you highlight several of the major publications dealing with school finance?

A. Yes, I think there are probably two areas that would be of interest. One, I have some extensive publications which have been in professional journals, as well as consultant reports that I wrote while I was employed by the Syracuse University Research Corporation under contract with the U.S. Department of Health, Education & Welfare. Oh, I don't know, but probably a dozen of those reports were submitted to H.E.W. in the area of educational finance.

In addition to that, there were consultant reports and other work that was done for the City of Los Angeles School District, the State of New York, the State of Ohio, and we had done some work in Texas, although I have no publications in that area.

In the area of declining enrollments, specifically, I have written a recent article in the Journal of Education Finance on the problem of declining enrollments in the United States.

MR. ROOS: We move that this witness be certified as an expert in school finance.

THE COURT: Very well. The motion is granted.

Q. Dr. Firestine, in the course of your studies have you had an opportunity to evaluate whether the reduction of students reduces the cost of a school district?

A. Yes, I have.

Q. Could you briefly describe the process of the interrelationship between studen reduction and cost reduction?

A. Yes, it's a surprising outcome that you come to, because the first expectation that one would have about the financial effect on the school district of enrollment

decline would be that you would anticipate that a decline inenrollments would seem to decrease the cost of school districts and, therefore, be a financial advantage to the school district. However, if you look at the situations facing almost any school district in the country, you will see that that's really not the case. It is the reverse of that, and that's the truth for two basic reasons.

One has to do with the structure of educational expenditures, the cost structure within individual districts, what I would call internal concerns, and the second has to do with some external concerns, specifically, related to the state aid structure within a given state.

First, with respect to the internal concerns -- oh, and I should add that in recognition of this problem of the financial bind that declining enrollments has put on local school districts, a number of states, not including Texas, have enacted special provisions in their state aid formulas to essentially ease the burden, the financial burden upon school districts of enrollment decline, but, as I say, Texas does not have so specific a provision as that.

Now, let me talk briefly, if I may, about two different kinds of concerns reflecting on this question. One is the internal problem, having to do with cost structure in a school district. Specifically, if you look at the major kinds of expenditures that school districts are required to support, I think it's safe to break those costs down into what I as an economist would prefer to call them relatively fixed and relatively variable costs, attempting to do tht in a way that would be consistent with the way we look at the private sector.

Within the fixed costs that a school district would have, the primary fixed cost would constitute admin-

istrative costs, cost of carrying on the administration of a school district, which totaled about fourteen percent in 1975-'76 statewide in Texas, and maintenance operation costs, which constituted about eleven percent in the same period, so together those are the two major items of budgetary costs, totaling about twenty-five percent of current operating expenditures on the average, which would be considered relatively fixed.

Now, let me explain why I say that. Just because the enrollment ina school district would decline by a moderate amount, and most of my comments would relate to that specific sort of concern -- we cannot presume that specific expenditures for maintenance operation and for administration would commensurately decline, that is, school buildings still have to be maintained in the usual way. Administrative responsibilities usually do not change whether or not there is a small decline in the enrollment being served by those maintenance and operation and administrative personnel. Certainly, purchase of supplies, et cetera, would not be meaningfully affected by that for those purposes, so even though enrollment declines proceeded at a relatively moderate rate, we would find that the cost of maintenance, operation and administration, in fact, would be relatively fixed.

Secondly, of course, if we're talking about expenditures for debt service or debt retirement, that would reflect expenditures in the past which were maintained and would be maintained over a continuing period of time, and enrollment declines, as they may proceed at a moderate level, would than also have no effect on reduction of debt service, so there are those three major areas of maintenance and operation, administration and debt service, which I would prefer to call relatively fixed levels of expenditures and unaffected then by declining enrollments.

The other area which I would treat more as a variable cost would be instructional expenditures per se. Specifically, we would anticipate at first glance that as numbers of students being instructed decline, we would be able to reduce the number of teaching personnel commensurately.

Now, there are a couple of problems with that having to do with the cost of instructional salaries. One is, of course, we can't simply expect a decline of a few students to lead to the termination of employment of a given teacher. That would only occur in situations where sufficiently large numbers of students were essentially not to be present to permit and entire class to be eliminated, and in that case perhaps the teacher's duties would be deemed unnecessry, but even in those conditions we have limitations that face local school districts with regard to tenure provisions and with regard to the desirability of maintaining teachers on the faculty, such that over a period of time, perhaps, attrition is generally the stronger reason for getting rid of teachers under enrollment declines than we would find the reduction of teachers by immediate termination, and even if personnel are to be fired in the face of an enrollment decline, the cheaper teachers, those with less experience and which are generally not in a tenured situation, would be released first, or perhaps, before that quite low-cost teacher aids would be released before a regular teacher would be released, so even if you look at it as approximately sixty-eight percent of current public school expenditures which are attitributable to what I would call relatively variable costs of instruction, even that sixty-eight percent of current public school expenditures which are attributable to what I would call relatively variable costs of instruction, even that sixty-eight percent is not easily susceptible to reduction in the face of enrollment declines and, certainly, the fixed costs that I maintained before are quite

resistant to reduction in the face of enrollment declines.

Q. Speaking now to instructional salaries and instructional services, that aspect, can one give any sort of a rough guideline as to the number of students one would have to exclude in a given school or in a given grade before you could even begin the process of winnowing out teachers and faculty members?

A. Yes, as I said, generally, you wouldn't be able to maintain any economies (sic) in the reduction, unless you were to eliminate approximately an entire class size, that is, twenty to thirty students at one given time and in a specific grade. If enrollment declines, as they generally do proceed, occur across a number of grades or occur over a period of time, then you've got modest declines throughout say an entire school plant or an entire school building, but only until the impact of those declines could be organized to be able to reduce and entire giben grade or given classroom, which would constitute a given grade or a specific teacher's responsibility over those students, then you would not be able to reduce the number of teachers dealing with those students. You would simply find dwindling class sizes throughout the school, even though the number of classroom teachers and the number of classrooms they supervise would probably be maintained at the same level, so during one year it would probably have to be a sizeable reduction of twenty or thirty at a given grade level.

Q. At a given school also?

A. Yes, right.

Q. Dr. Firestine, if the per-pupil expenditures in a given district were hypothetically $1,000.00, would it be fair to say that the exclusion of the student would save the district $1,000.00?

A. No, no, it would be much less than that.

Q. In fact, if I understand your testimony, the exclusion of certain students would have little, if any, impact on your costs which are fixed. Is that right?

A. That's correct.

Q. Dr. Firestine, are you familiar with the way the schools are financed in the State of Texas?

A. Yes, I am.

Q. Would you briefly describe the basic sources of financial aid to a school district and their relative percentages?

A. Well, if you look at the three major sources, they are, of course, the federal, state and local governments, and the proportions, I think, in the most current year would be about fifty-four percent from the state or through state aid, about thirty-eight percent from the local districts – this is an average figure, of course, across the state – and about eight percent from the federal government, so the majority would come from the state.

Q. Could you briefly describe the formulas that are utilized to distribute general state aid?

A. Yes. Now, I think the two major aspects of state aid that would be most relevant here really relate to external situations that I referred to earlier, that is, the Foundation Program, which provides the bulk of that general aid, and equalization aid, which is also distributed to school districts. The Foundation Program is based on a fairly complicated formula, which is quite difficult to go into briefly, but, essentially, it's a small distribution per student, that is, per student in aver-

age daily attendance. That's about $100.00 per student.

In addition to that, the major aspect of Foundation Program aid is based on a formula which accounts for the number of students in groups of grade levels, and the state's idea behind that is essentially to provide a minimum level of support to each district for each approximately twenty students that would require a teacher, so there is essentially within a Foundation Program a heavy involvement of the state to provide a basic salary level for teachers, in accordance with the scheme that the state mandates, which the school districts must follow.

Now, as long as a given school district levies the required tax rate to be participant in the Foundation Program, they fall into the schedule. They receive this allotment for personnel units which the state provides, and they also receive this additional approximately $100.00 per pupil amount, which together totaled the Foundation Program support.

Now, the equalization program support, which is a smaller level within the state, is based essentially on property wealth per A.D.A. or per average daily attendant student in school, and it is oriented primarily towards the relatively low wealth or poorer school districts in the state.

Q. Taking these basic sources of money, is it possible that the school district would los state funds if it excluded a student from school?

A. Yes. In both cases, as I have explained, with the Foundation Program, which is a complicated arrangement, certainly, there would be some reduction by reducing the number of average daily attendant pupils being counted. In equalization aid this would also occur because as numbers of students that were

counted in attendance in a school district were reduced, the school district would then appear to be more wealthy in terms of its property wealth per attending student. In that case the district, as it appeared to become more wealthy, even though the actual property value in the district had not changed, as the district appeared to become more wealthy on paper, it's actual equalization would thereby be reduced.

Q. So a law that excluded certain children from school would strike more strongly at a poorer school district because of the equalization aid formula than at a wealthier district?

A. That's true, yes.

Q. Given the funding formula based on students in attendance and given the intransigence of costs, is it possible that a state law that resulted in exclusion of certain students from school could result in placing a school district in a great financial squeeze than it was in before?

A. Yes, I think in general that would be true within the state and, certainly, it's true across the country. As we were to look more carefully at the situations of individual districts, we might want to ask the extent to which this would occur, and it's hard to generalize beyond the sorts of programs that we see in existence, that is, if we're operating from a relatively fixed scale of program, which we generally are under these conditions, then what you are suggesting would certainly occur, and the school district would be essentially worse off.

[page 105]

CROSS-EXAMINATION

BY MS. CARDWELL:

Q. Let me pose a hypothetical to you, Doctor. Are you familiar with the Houston Independent School District?

A. More or less.

Q. It's a rather large school district.

A. Yes.

Q. If say you added five thousand children to that school district in one fell swoop, who required special education in some areas, are you saying that Houston I.S.D. would make money or not be out any additional money on the basis of your figuring here?

A. Well, you know, this is one of the situations where we have to back off and say to answer this properly, we would have to look at some of the data that are involved, and I don't know (a) the structure of the state aid receipts that Houston I.S.D. receives, the number of students involved, although I know they are considerable, nor do I know the structure of the special educational needs that exist within the district in Houston relative to general educational expenditures. You referred to – I'm not sure of your exact words, but the sense I got was the students would have some sort of special needs which go beyond the kind of funding that I have outlined, and I have to know something about the extent of those needs and the extent to which those needs could not, in fact, be met by existing personnel or by existing programs that were already underway. If you could give me an

estimate of the percentage impact on the size of the student body of what that five thousand might be, that would even help me. Five thousand itself doesn't help me, unless I can related that to the total size of the student A.D.A. in Houston.

Q. Well, regardless of the special factors, it will cost more money for the state or Houston I.S.D. to educate five thousand additional students, would it not?

A. Well, the additional students coming in would, assuming five thousand in the district the size of Houston is a relatively incremental size, the cost would go up, but we have to remember that the distribution of aid and also the economies at scale (sic) and also the operating of classrooms would probably not raise the cost terribly, terribly much.

For instance, it doesn't cost you that much more in terms of actual expenditures to educate twenty-seven students in a classroom, as opposed to twenty-six. On the other hand, if we needed additional classrooms for specific educational purposes, which you are suggesting but aren't really outlining for me, then your cost might increase, but we would have to know something about the extent to which new kinds of classrooms might have to be formed.

Q. O.K., I take it that the figures you were giving Mr. Roos in terms of whether there would be a declining cost, or it would cost the school district no less do not take into account any special expenses or the building where it may be filled to capacity already, and adding twenty students may require an additional room. Nothing like that is taken into account in your general figures.

A. Well, to the extent that you would have to have additional capital expenditures or expansion of plant, if

that were the case, if there was, indeed, a large city school system like Houston, not very much available excess capacity in terms of classroom space, then if you had to go into a building program, there would be some additional cost, but I'm not sure if that would be the case or not without having more figures than I have.

Q. What if all the five thousand students we added to Houston I.S.D. needed bilingual education? Would that change your —?

A. I'm not sure, because I don't have figures in front of me about the costs of the bilingual program. I'm sorry.

[page 111]

Q. And they also deal with just the general increase or decrease of student populations, do they not? They don't take into account special problems.

A. No, I'm not trying to account for special student needs.

TESTIMONY OF
DR. JOSE CARDENAS

[page 116]

Q. Dr. Cardenas, have you had the opportunity to work in or with a school district of significant numbers of undocumented children?

A. Yes, sir, both as a profesional employee of the school district, as well as a consultant relationship with school systems.

Q. Could you sort of generally relate that experience?

A. Well, I was a teacher in the Laredo Public Schools where there were a large number of alien childen, both documented and undocumented, and then I was a teacher and administrator in the Edgewood School System in San Antonio, Texas, in which, again, there were many children that were alien. I have worked with superintendents and other staff of other school districts concerning the implementation of programs for alien children.

Q. Have you had the opportunity to observe the educational needs of these chidlren?

A. Yes, sir.

Q. Does the undocumented alien frequently need some form of bilingual instruction?

A. Very frequently the undocumented alien from Mexico and other non-English-speaking countries do require some form of bilingual education program.

Q. In having this need, does the undocumented alien differ from recent migrants who are legal?

A. They have many characteristics, such as language and cultural heritage that are very similar, requiring a similar school response.

Q. In having the need for bilingual education and culturally compatible programs and other things of that sort, does this child differ from most other children of Mexican ancestry growing up in Texas?

A. The characteristics are very similar, and the educational needs are also similar.

Q. Do most school districts in Texas, in fact, have a minimally adequate bilingual program?

A. No, sir.

Q. If they did have such programs, should there be any additional problems caused by having to deal with the illegal child or the undocumented child?

A. No, sir, assuming the school district had an adequate program in bilingual education and multi-cultural education, there would be no additional problems in dealing with the alien child. On the contrary, I think there would be less problems in dealing with the alien child.

[page 120]

Q. Are there federal programs available for bilingual education?

A. Yes, sir, there are many federal programs that provide money to Texas schools providing bilingual education, including Title VII of the Elementary-Secondary Education Act, Title I of the same Act, the Right-to-Read Program, Follow-Through Program, the E.S.A.A. legislation and other governmental grants that are available and are being utilized in Texas schools for bilingual education.

THE COURT: What is this E.S.A. (sic)?

THE WITNESS: E.S.A.A. is Emergency School Assistance Act, the desegregation funds.

Q. Apart from bilingual programming, do illegal children have any other educational needs that need to be addressed?

A. Would you repeat the question, please?

Q. Apart from bilingual programming, do illegal children as a class alone, as contrasted with legal children or citizen children, do illegal children have any other unique educational needs?

A. Depending on the grade level at which they transfer to an American school, they may have minimal types of educational needs. Most of it, I think, would be language-cultural-oriented, and by your term, bilingual education, if you refer to a bilingual multi-cultural program, there would be very little, and those only for children that transfer at a rather advanced stage and have not had American Social Studies, Texas Government and so forth.

Q. Have you had any opportunity to observe the level of educational preparation of children coming in from Mexico at upper age limits?

A. Yes, sir, I have had many interactions with children from upper age limits.

Q. Could you describe any common observations that one could make about the educational preparation of these children?

A. It has been our experience that in the education of alien children they tend to perform at levels much higher than American-born minority children. In general, they perform better than American-born and race minority children.

[page 123]

Q. From your observations and discussions with these people what are the primary problems caused by this migration into the area?

A. The migration of alien children, undocumented alien

children, creates a problem that in the State of Texas, unlike most of the other states of the Union, there's no provision for a capital outlay cost out of the state funding for education. Therefore, all funding of education has to be carried out -- and construction has to be carried out at the local level. Many of the border area school systems are relatively poor school districts, and without the equalizing effect of a state program of per-capita outlay, the whole cost creates an economic imposition on the school district. In general, they have to provide at local expense the capital outlay facilities for the implementation of educational programs.

[page 128]

Q. Dr. Cardenas, for how many years approximately have you been involved with educating children?

A. About twenty-seven and a half years, sir.

Q. Have you made any conclusions about the consequencies to a child of the denial of an education?

A. Yes, sir.

Q. Could you briefly describe what your conclusions are as an educator of the exclusion of a child in the United States today from an education?

A. I think that the exclusion of a child from education locks the child into a life of poverty. Very frequently the unavailability of upward mobility leads to frustration. In some cases it leads even to socially undesirable behavior. I think that a person that does not have an education in the highly technological era in which we live would be at a disadvantage in competing for employment and would tend to be unemployed or underemployed. I think that they would have a hard

time achieving upward mobility. In general, it would be a very detrimental and unsatisfactory life for an individual.

Q. Are these consequences more or less for a child of a Mexican background growing up in the State of Texas.

A. I would think that they would be much more severe for a poor child of a Mexican-American background in Texas.

Q. Will you briefly describe why that is so?

A. Well, I think that a child from an affluent family may have the resources for providing employment either with the financial resources available to the family or else be able to move into some kind of position that would be not available to a person that would come from a poor background. Mexican American, because Mexican Americans are more systematically excluded from the higher-paying positions in most areas of Texas employment, and Texas, because I think that Texas, as described earlier by another witness, the ethnic or racial strife in Texas is, perhaps, more acute than it has been on other states, so, in general, a poor Mexican American in Texas would be very severely hampered by the lack of an education.

Q. In the course of administering school districts and in the course of observing school districts have you had an opportunity to observe whether there are substantial numbers of children who were previously here illegally who have legalized their status and become legal resident aliens?

A. As an administrator and teacher, yes, I have had children in my care that were here illegally and legalized their status and stayed in the country.

FURTHER CROSS-EXAMINATION

BY MS. CARDWELL:

Q. When did Mr. Roos or Mr. Daves contact you about testifying in this case?

MR. ROOS: We object to that, Your Honor. I don't see any relevance to that whatsoever.

THE COURT: The objection is overruled.

A. I really don't know. I have been working with MALDEF for at least four or five years in cases.

[page 138]

Q. Do you testify for MALDEF, or have you testified for them before?

A. Yes, ma'am.

Q. And you do that fairly often?

A. Yes, ma'am.

TESTIMONY OF DICK LINDSAY

[page 144]

Q. If you excluded say one child from the Tyler Independent School District, would your costs go down?

A. That would be hard to determine, but probably not.

Q. It would take a fairly substantial number of students to exclude before, in fact, your costs would go down ordinarily. Isn't that the case?

A. Yes, sir, I think it would determine in our case what particular school this decrease happened to be in where the decrease would take place in the district.

Q. You would, in fact, need a fairly significant number of students in a particular given grade or a given school before you could produce any savings by excluding children from school, would you not?

A. Yes, sir.

Q. Even if you were able to reduce – get some savings by doing that, you would still have certain fixed costs, such as debt maintenance and other sorts of maintenance costs that would remain, irrespective of how many students you excluded from the school, would you not?

A. Yes, sir. Debt maintenance, now, is not a part of the general operating budget.

Q. But maintenance costs and other sorts of costs would remain steady, would they not?

A. Yes.

TESTIMONY OF MR. PLYLER

[page 154]

REDIRECT EXAMINATION

BY MR. ROOS:

Q. Mr. Plyler, it's not your position that bilingual education is a bad thing, is it?

A. Oh, no; oh, no.

Q. It's a desirable thing —?

A. That's why we have three teachers when we're really not required to have three, trying to meet the needs of the youngsters.

Q. So that in fact, while you might have to buttress up your program with new undocumented children who have these needs, it's not fair to characterize that having these children will trigger your obligation to comply with the law, is it?

A. Mr. Roos, I mention this, because as we go under the state law, then there are so many guidelines, reports and voluminous reports, testing and evaluation and so on that take so much time, we are providing the program as outlined by the state, yet, without the necessity of having to go through all of their reporting procedures.

Q. So what you would like to be able to do is to provide bilingual programming to everyone who needs it without the paper work?

A. That's correct; that's correct.

Q. If you were to hire new teachers, you would get a certain amount of money from the state, would you not, per —?

A. The state assigns personnel based on A.D.A., not based on ethnicity of the district, of course.

Q. But if you have additional A.D.A., which means students additionally, then you would get additional funds, would you not?

A. Additional teachers assigned, plus M. & O. money. That's correct.

THE COURT: M. & O.?

THE WITNESS: Maintenance and operation, Your Honor.

Q. Isn't there a way the state funding, and I realize it's very complicated, and I don't pretend to understand it thoroughly myself, but if, indeed, you increase by something like twenty students, you get money for one teacher or something similar in the formula?

A. It's based on a grading scale, depending on grade levels, yes, sir.

MR. ROOS: Thank you.

[page 158]

Q. I wasn't quite sure how you deal with students who are in need of bilingual education now, in other words, how is that function handled in the school system?

A. They are provided special instruction through our Title I program, which does not eliminate those youngsters from that program. We have worked with these youngsters for several years through these programs by having small groups coming in with a bilingual teacher. As you know, they're taught in Spanish, their home language, first, and then as soon as we can get them in the English language, then we, of course, begin to instruct them in English, because we feel tht it is to the youngster's advantage to master English as soon as possible. We find that it is much easier to master a language at a younger age than it is after they get in the upper elementary school, so these teachers work with these youngsters in small groups, instructing them in English and trying to bring them – or in the Spanish in trying to bring them into English as soon as possible with flash cards and various

other types of equipment, instructional supplies that we have.

Q. Are these Title I teachers?

A. Title I teachers and regular teachers. We have one title I teacher who is bilingual and two regular teachers.

Q. What is the goal of the bilingual education program?

A. It's an attempt to provide a setting for Spanish-speaking youngsters in order to provide them with a background that they can make progress in the schools of the United States, since most of our materials are printed in English.

Q. Does it have any goals related to Anglo – English-speaking students.?

A. Yes, I think there are advantages there for those Anglo youngsters who are involved in those classes with alien youngsters. As the teachers work with those, I think the Anglos receive benefits from the culture discussed and the language which is spoken.

STATE DEFENDANTS' OPENING STATEMENT

MS. CARDWELL: Basically, what we will attempt to show or what we will show is the impact on the educational system that it impacts to the detriment of the citizen, the legally admitted child, particularly in the border areas, and the areas in which you find large Mexican-American enclaves, which Tyler is not one of those areas. That's why you don't see the impact from Tyler lik eyou see in the Houston I.S.D., Brownsville, San Antonio, Eagle Pass, Abilene – different places around the state where there are Mexican-American enclaves, mostly the border areas and up I-35 as that is the pattern of migration that th illegal alien follows.

I think our testimony will be somewhat shortened, because we were not presented with testimony on preemption, which we had planned originally (words unintelligible to reporter), not as regards to status by plaintiffs' case already, so what we will attempt to show is that there is deterimental impact on the other students due to cost factors. There are cost factors which fall outside the average daily attendance costs in terms of lost textbooks, removed textbooks, problems you would not have with the average student.

TESTIMONY OF THOMAS ANDERSON

[page 170]

Q. As a part of your work at T.E.A. have you compiled statistics concerning the number of Mexican alien students in Texas schools?

A. We have.

Q. Have you compiled those statistics for '75-'76 and for '76-'77?

A. We have.

Q. Could you tell the court, please, what the total enrollment is during the current year in school?

A. In school enrollment for the '76-'77 school year was 2,239,000.

Q. And what portion of that was Mexican alien immigrants?

A. 51,239 or approximately that number.

Q. Do you recall the statistics for the current year?

A. The statistics I gave you were the statistics for the past year. The statistics for the previous year, for the '75-'76 school year, were the two years that we compiled. We do not have the statistics for this current year that we are in now.

[page 172]

Q. What did you say those surveys showed in terms of growth or increased enrollment of Mexican alien immigration in the schools?

A. This survey that I just spoke of indicated that in the State of Texas for the '75-'76 school year there were 2,218,000 total enrolled. Of that 44,799 of that total enrollment were immigrant alien students born in Mexico, which is 1.59 percent of the total statewide enrollment. The following year, or 1976-'77, as of January the same survey was taken in all school distrcits which you handed me, the second survey. This showed that there were 2,239,000 students enrolled in Texas schools. 51,348 of those were alien immigrant children born in Mexico, which is 1.8 percent of the total enrollment, showing a growth from 1.59 to 1.8 percent total enrollment, showing a growth of over 6,500 students from Mexico in the schools from the '75-'76 to the '76-'77 school year.

Q. 6,500?

A. Yes, ma'am, in excess of 6,500.

[page 184]

Q. Thank you, sir. Now, with respect to Title I funds, I'm going to give you some figures in terms of dollar amounts received by the State of Texas over the course of the years, and I would like for you to tell me

if these conform to what you believe the dollar amounts received in the State of Texas are.

For fiscal year 1970 the state received $75,601,664.00. Does that sound like the approximate amount?

A. I would be unable to give you an exact dollar figure, but that's approximate.

Q. And in 1975 the State of Texas – and this is the total State of Texas – received $123,562,744.00. Does that sound right?

(REPORTER'S NOTE: There was no audible response from the witness.)

THE COURT: Answer for the record.

A. Yes, sir.

Q. And for the year 1977 – I guess this would be a projection or whatnot or request, or maybe it's received. I don't know – $147,992,810.00. Does that sound like the correct amount that the State of Texas either has applied for or has received?

A. When you talk about Title I – may I ask a question here? Are you talking about the inclusion of the Title I migrant and the Title I regular?

Q. I believe that's included.

A. Yes, sir, it sounds —.

Q. So, in fact, it has increased almost double in the last seven years, the total allotment to the State of Texas. Is that correct?

A. Yes, sir, it has increased.

THE COURT: Has it increased in approximately the proportion that counsel has mentioned?

THE WITNESS: Yes, sir.

TESTIMONY OF ROLLAND HESTON

[page 193]

Q. Would you state your name and place of residence for the court, please?

A. My name is Rolland W. Heston. I live at 3001 Teague, Houston, Texas.

Q. Are you appearing here today pursuant to a subpoena, Mr. Heston?

A. Excuse me. My hearing isn't as good as it used to be, and I didn't hear her.

THE COURT: She's asking if you are here pursuant to a subpoena.

THE WITNESS: Yes.

Q. What is your present employment, Mr. Heston?

A. I am the District Director of the Houston District of the Immigration and Naturalization Service.

Q. How long have you been with the Immigration and Naturalization Service?

A. Thirty-six years.

[page 198]

A. Well, President Carter's proposal was just that, a proposal. It has now been introduced into Congress. To my knowledge no action has been taken. No hearings have been held as yet. However, in the Houston office we have had people appear within the last few months at our information counter and want their status adjusted or regularized because of the proposal that was made by the President. They are very unhappy when we put them under what we call docket control and tell them to leave the United States. I must say within the last three to four weeks we haven't had anyone come in. I believe the word got out in a hurry.

(LAUGHTER)

[page 199]

Q. Did the Service, when it was making estimates in '76, have estimates on statewide numbers of aliens in Texas and on nationwide estimates of the numbers of illegal aliens in the country?

A. You mean undocumented aliens in general, total?

Q. Yes, sir.

A. Well, yes. There were estimates that there were from six to eight million, and I saw some estimates that were twelve million. I don't believe that came from our Service. I think this was exaggerated materially.

Q. And were there estimates by I.N.S. on the numbers of illegal aliens in Texas?

A. The estimate at that time was close to a million undocumented aliens.

Q. And have you seen any signs that those numbers are decreasing?

A. Not to my knowledge, no.

Q. Now, from the past computations that your office made did you make estimates on the number of illegal aliens within the geographical district of Houston Independent School District?

A. Yes, we did in March 1976. We used two different methods, and we came up with two different figures, which were about fifteen hundred alien children of school age. The difference was fifteen hundred. By one method we arrived at a figure of 5,626 undocumented children within the Houston Independent School District, and by the other method we arrived at a figure of 4,120 undocumented children within the school district.

Q. Could you briefly explain the methods of calculation that you used in arriving at those figures?

A. Yes. First, I would like to define what we call leads. This is information we receive from the general public in the form of telephone calls, letters, personal appearances, telling us of undocumented aliens in the area within our district. In March of '76 we had twenty-one hundred leads on hand relating to twenty-five thousand undocumented aliens in the Houston metropolitan area. Today – and I want to say this to clarify it, because I have made statements since March – today we still have twenty-one hundred leads on hand, but they relate to forty thousand illegal aliens, or the information we're receiving relates more to industry where there's from a hundred to two hundred people, but I'll go back to '76 when we had twenty-one hundred leads relating to twenty-five thousand people. We sorted these leads according to

the boundaries of the Houston Independent School District and found that seventy-five percent of the information or information relating to 18,750 undocumented aliens were within the Houston Independent School District boundaries.

Over the past years, I would say fifteen or twenty years, the Immigration Service has estimated that they locate or apprehend one out of four or five aliens. That was standard. Over the last two or three years it has become quite apparent that the undocumented alien is not in the rural areas in the numbers that they used to be. They are in the cities, the metropolitan areas, and we estimate that we only apprehend or locate one out of every ten undocumented aliens, so we multiplied 18,750 reported undocumented aliens by ten, and we come up with 187,750 undocumented aliens residing within the Houston Independent School District boundaries.

With our limited force we only locate very few children and women, because we are working in the employment area, and during this period we were averaging apprehensions of 448 undocumented aliens a month, and there were 25 women or children of that 448. It was found that sixty percent or 15 of the women and children were children of school age. This amounts to three percent of the 448, so we took the three percent of the estimated total undocumented aliens reported, and that gave us a figure of 5,625 undocumented children within the Houston Independent School District.

Our second method—.

THE COURT: How many of those would be of school age?

THE WITNESS: We estimated that they were all of school age.

A. Our second method, we resorted the pieces of information relating to undocumented aliens and found 147 leads relating to families residing within the Houston Independent School District, and there were 412 children reported. Again using the one-to-ten ratio we arrived at 4,210 undocumented children of school age within the Houston Independent School District.

[page 204]

Q. Back to the figures that you proposed for Houston I.S.D. between the four and five thousand figure, would you say that those figures are conservative or exaggeraged?

A. When this estimate was made, and I still stand by that, it was a factual and conservative estimate.

Q. Why would you say it is conservative?

A. Well, I believe by nature, and I believe anyone will testify to that, I have been conservative all my life. I have found if you are realistic in your estimates, no matter what it is for, if it's justification for funds, manpower or anything, you have a better chance of sustaining and receiving good results.

Q. In the numbers of pickups, do you pick up a higher number of singles, as opposed to families, because a family is more integrated into the Mexican-American enclave?

THE COURT: When you say pickups, are you speaking about apprehensions?

MS. CARDWELL: Yes, sir.

A. Yes. With our limited force we have not, you might say, worked the street as much as we would like to or

as should be done. A great number of undocumented aliens are referred to us by other law enforcement agencies, city, county and state and federal. When we do go out on the street or on area control operation, based on the leads that I previously mentioned, we try to go to the places of employment where they are paying the highest salary to make a job available for a citizen or a resident.

Now, most of the undocumented aliens are men. They may not be single. They may have families in other countries, and very few of them that we have had as a result of referral from law enforcement agencies are married in the United States, or if they do have a wife or children here, they do not tell us about it. They want to go back home, especially the Mexican National, directly from our office. They do not want to go to where they reside, and, generally, this is because there are others there that they don't want us to know about.

Q. So you are just generally less likely to find a family than the single individual?

A. Yes. Through checking employment we are less likely to find the family or the family man.

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Q. Does the nature of the illegal alien lend itself to an accurate accounting of its precence?

A. I'm sorry. I still didn't follow you.

THE COURT: I'm not sure I understood the question either.

Q. Does the nature of the illegal alien lend itself to an accurate accounting of numbers and presence within the state?

A. Well, no, of course, an undocumented alien doesn't want to be apprehended. From my experience and Service experience, generally, they are excellent workers, work long hours; they go home and come back early the next morning. After they have been here a while, they may get out on the street on weekends and unfortunately be apprehended or arrested for some local violations, but generally they stay away from the Immigration Service, and, especially, those that have families here are not out to where their status may become known, unless some friend or someone else reports them. If they have a family, they're usually with their family, and they don't come to our attention as much until they need something, and then they may come to our attention.

Q. What percentage of the illegal aliens we have been talking about are Mexican Nationals?

A. At least ninety percent of the undocumented aliens located or apprehended by our office are Mexican Nationals.

Q. In dealing with the illegal alien have you had occasion to learn whether or not he pays taxes?

A. From my observation of the checkstubs – once in a while I go into the investigations. I may decide that this week I'm going in to look at the apprehension forms to see what is happening. Where are they getting these people? How much are they making and so forth? I haven't done this recently. I did this about three months ago when we were apprehending – at that particular time we had about two hundred apprehensions a week, and there were not checkstubs on every one, because some people don't receive those, but of all those there, and I would say that sixty percent had them, there was not one dollar of federal income tax deducted on those checks that were paid.

Q. Why was that?

A. Well, all I can surmise is that their exemptions that were claimed were so great that there was no federal income tax due.

Q. Do you find instances of exemption falsification?

A. Yes, we have. This has gone on for years and years. It was two years ago in the Dallas office, which was then under my jurisdiction, and for ten days they made a survey of the number of exemptions being claimed. They only located eighty-even aliens in that ten days, which was light for the Dallas office, but of those eighty-seven there were 462 exemptions claimed. One sixteen-year-old lad was claiming sixteen dependents or exemptions, and we find this all the time.

We have reported it, but the other federal agencies are as short-handed as we are. If we apprehend an undocumented alien with more than $1,000.00 in his possession, we call the Internal Revenue Service, and they come and figure his tax, whether he owes any or not. If it's less than $1,000.00, it's more time consuming than it is worth.

Q. Finally, based on your years of experience with the I.N.S. – we have talked about the percentages of children, from twenty to thirty percent, would you say that an estimate of three percent children is unfair for the state or would be a fair estimate?

A. Well, I can't speak – again, I say I can't speak for the entire state, but that three percent figure that we used, I believe it is valid. I would say it is very conservative, but I would stick with it. Under the Silva decision we say we are locating thirty percent who are children of school age, but this is more or less a concentrated processing of people that were within

that three percent. This processing of the Silva cases will not continue indefinitely. This is something we're supposed to do as soon as possible.

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Q. On what factors do you base your statement that you apprehend approximately one in ten undocumented aliens in a metropolitan area?

A. From our experience I can specifically talk about the Houston metropolitan area. We have leads on forty thousand aliens, and we are locating only about four to five hundred a month, and I don't think we're doing that good in the Houston area. It may be one to twenty in that particular area without resources and manpower.

Q. From what sources do you get these leads?

A. From everyone. People call on the telephone. People appear in the office. People write us letters, not only from individuals. It could be – it's both from the private and public sectors. We receive information in all manners. On phone calls and personal appearances we reduce it to writing, the information they have.

Q. Do you and/or people on your staff follow up each lead?

A. We do to the best of our ability. No, we are unable to follow them all. With our manpower we cull those that we believe need the most attention, aggravated cases, and, as I stated before, those where they are working, where they are making the highest salary to open the job for a citizen or permanent resident.

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Q. You testified that of those people in the Silva class whose documents you are in the process of adjusting, approximately thirty percent of the families are children. Could you briefly describe those people who comprise the Silva class?

A. Well, those people come under a court decision in the Federal Court in Chicago called Silva versus I evi decision, which was compiled in behalf of the Western Hemisphere natives who claimed that they were discriminated against in that visas were made available to the Cuban refugees and not to the natives of the Western Hemisphere. The court ruled in their favor. The State Department and Immigration Service advised that there were approximately 145,000 visas issued to Cuban refugees, which have been made available to the entire Western Hemisphere, so as of March 11th our instructions are that we will process these people to locate them, identify them, give them a copy of the court decision and advise them of any benefits they may be eligible for.

I got ahead of myself. These persons must have had a priority date with the Consulate; that is, they must have been in contact with the Consul and registered for the issuance of an immigrant visa prior to December 31st, 1976, and must have been in the United States on March 11th.

Q. Are a number of these people parents of citizen children who have petitioned for the admission of their parents prior to the change of the law in January of 1977?

A. Yes, many of them are. They have one United States citizen child born here while they were on an undocumented status.

Q. At least one child?

A. Yes.

Q. So at least a certain number of these thirty percent children in the Silva class are citizen children?

A. No, no, we did not include the citizen children.

Q. But these involve families with citizen children?

A. Yes, there are some that did not have the children. Someone else had filed in their behalf or they were qualified in some other way, but the majority of them have one United States citizen child.

Q. In your experience with legal immigration have you noted that some people now being legally admitted to the United States have been here in an undocumented status previously?

A. Oh, yes, that's true.

Q. In your work in the immigration field have you come across people who have lived for substantial periods of time in the United States as undocumented aliens, greater than seven years?

A. Well, yes, I have become aware of quite a number through the years who have been here more than seven years, yes.

Q. Do these people include people who have come to the United States as infants or young children and have lived to their early adult years without being documented?

A. Oh, yes, there are some, yes, that have been here twenty years and married and had children.

Q. Do these people often marry citizens?

A. Generally citizens or permanent residents, yes.

Q. And thus have an opportunity to adjust their status in that manner?

A. Yes, those that come to our attention, we advise them of all the administrative relief available and encourage them to file the proper documents.

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Q. You stated that the I.N.S. policy is to give priority to reports of illegal aliens working at those places which pay the highest wages. Is that correct?

A. Yes.

Q. Doesn't this have the effect of creating an underclass of jobs in which there is less or no enforcement if the jobs are the least desirable, least economically rewarding?

A. I do not know. It was a practice of the Service to create or locate aliens who were making the most money and the highest salaries so that a local citizen and permanent resident could take over that job and support himself and his family.

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Q. Sir, in your judgment if President Carter's proposals were implemented in the form of legislation, particularly, with reference to adding personnel to the Immigration and Naturalization Service, would you be able to control the problem better?

A. Of course, more resources of any kind would help. In my own personal opinion they do need more manpower along the border. However, I have been in the district offices so long, and we have been so understaffed that we cannot do our work in the interior as we would like to do, and we need that across the board.

Q. How much of an increase in personnel percentagewise would you need?

A. Well now, I can only speak for my district.

Q. Yes, for your district.

A. I must say that when I went to Houston as District Director four years ago, our first budget proposal, which was put in in December '73, we asked for twenty-eight investigators in the Houston district. We had six at that time. As of today we have ten, and we still need twenty-eight to thirty investigators to adequate do our job.

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TESTIMONY OF DR. CHRISTOPHER SHANE DAVIES

Q. Dr. Davies, would you state your name and address for the record, please?

A. My name is Christopher S. Davies, D-a-v-i-e-s (spelling), and I reside at 3317 Perry Lane, P-e-r-r-y (spelling), Austin, Texas.

Q. Where are you currently employed, Dr. Davies?

A. I am Associate Professor of Geography and Community and Neighborhood Planning of the University of Texas Austin.

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Q. What is the basis or what has the study of the undocumented alien consisted of that you have done and worked with?

A. This specific study was the investigation of something around 3,500 pieces of information from the San Antonio branch, of which a random sample of 546 pieces of information on the undocumented worker was collected, and from that material inferences were developed on their characteristics, their mobility patterns in the United States, et cetera.

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Q. Dr. Davies, could you please describe the general pattern of migration into the U.S. of the undocumented alien?

A. Well, the information we gathered permitted us to ascertain the residential location and sometimes the birthplace location of the undocumented worker within Mexico, and in part from the documents his step-wise migration patterns in part through Mexico to the border towns and then the springboard into the United States.

Specifically, the geographic pattern that we ascertained primarily channeled itself along the major transportation routes, such as IH-35 through the major metropolitan areas of San Antonio, Austin and Dallas. The other stream was, of course, around the south coast toward the Houston area, moving into Florida, and the other one up through the Midwest.

Q. Where do you find concentrations of the illegal Mexican alien?

A. Well, there were two findings on the geographic pattern. In fact, those undocumented workers who had residences within the United States were found deeper into the State of Texas. In other words, they were found in communities such as San Antonio, Austin, Dallas and surrounding communities. Normally, we tended to find or associate the undocumented worker with Mexican enclaves within metropolitan areas, since they obtained nurture – in a sense they obtained some sence of protection and assistance possibly in searching for jobs, and in a sense they are, shall we say, less conspicuous.

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Q. Are you familiar with the Texas policy of excluding the illegal alien child from free public education?

A. I am, ma'am.

Q. In your opinion does that effect immigration into the country from Mexico?

A. As an attractive index, no.

Q. How would you say that the illegal Mexican alien who comes into the country compares with the legal aliens that come into the country?

A. On what points?

Q. In terms of Spanish-speaking ability, whether he's rich or poor, whether they live in the same places.

A. The general overall view or the portrait that I can ascertain is that they tend to be predominately Spanish-speaking and illiterate relative to – well, illiterate, and I think below the educational capabilities of immigrants in the State of Texas.

THE COURT: Excuse me. I had understood counsel's question to be – and correct me if I am wrong – she wanted a comparison, a relative comparison, of the educational ability and economic status and other characteristics as between the legal entrant and the illegal entrant. Is that what you have given us?

THE WITNESS: Yes. Excuse me, sir. I was trying to. From our findings they tend to be below the legal alien within the United States on educational capabilities, skill levels and from the viewpoint of earning power.

THE COURT: Are you able to account for that?

(REPORTER'S NOTE: There was no audible response from the witness.)

THE COURT: I mean the reasons for it.

THE WITNESS: It seems to me—. Well, first of all, sir, in order to become a legal alien, you have to conform to specific entry standards, and in that case usually that there is a job available to you in the United States, and in the sense that the U.S. policy has been, I believe, one of attracting or only allowing in, shall we say, the more educated legal aliens, as a consequence, individuals who originate from these rural areas of Mexico cannot conform to those standards.

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Q. You have heard the estimates of Ms. Houston at six hundred thousand in the State of Texas and also the estimates of Mr. Heston, which would range from 450,000 to a million in the State of Texas. Would you consider those estimates conservative in your professional opinion or exaggerated?

A. Well, since the major receiving states, if you assume there are six million people in the United States, and the major receiving states are those of the greatest geographic proximity to the Mexican border, and the major receiving states in the United States being California, Texas, New York and New Jersey, et cetera, I would assume that if you were to proportion the six million people, you would find those figures to be possibly in my estimation conservative for the State of Texas.

Q. Based also on the numbers of legal Mexican aliens in the state, would you say that those numbers would be conservative or exaggerated?

A. Well, if one makes the analogy from cultural reasons and from the viewpoint of assistance that there is a strong correlation between the residence location of illegal aliens and the distribution of the Mexican American population in the United States, I would say that, again, you can expect a large proporation within the State of Texas.

Q. You have also heard the estimates on children within the Houston district of being three percent, and then we heard something about it being as high as thirty percent, but if you would take the three percent on a statewide basis, would you say that that is a fair percentage of children?

A. Well, again, if you want to speculate on the nature of this data, I would say that three percent seems to be a good estimate conservatively.

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Q. Dr. Davies, as to your study or your observations concerning the differences between legal and illegal immigrants of Mexican origin, have you been able to

make any comparisons concerning the children of undocumented aliens, as opposed to the children of legal immigrants?

A. No, ma'am, within the study itself, in fact, a very small amount, which is negligible, in a sense, not permitting us to do such a thing.

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Q. What in your opinion would be the effect on the children of these illegal immigrants, if they are not permitted an education? What type of a labor force – or how will they affect the labor force in this country?

A. Well, it would be very sad, indeed, if a child, who is not, obviously, in any society provided with a means of obtaining an education, particularly, in a mechanized and specialized world. It seems to me today in our society that we are demanding a type of labor that not only citizens within the United States, but if we want to make parallels, people in the United Kingdom, people in France, people in Germany, people from Turkey, the West Indians and the Pakastani workers, there is a type of laborer for work that so many of us are receiving to participate in, in other words, the lowest sort of society, the very low blue-collar workers, and I assume that without the means of improving one's intellectual capabilities, you would set yourself in that strata, which is low-skilled or low-income jobs.

Q. If you have a person with low skills and low economic status, who is, moreover, threatened with the specter of the law, how do you place them as a sociologist? I believe you have some training in that. Is he in a state of virtual serfdom there?

A. I would say that he is in a sense in an unfortunate plight, an unfortunate position, simply because in some of the research findings we find that these individuals can be exploited in a sense through threat of being told that they would be apprehended, so I would say if you're looking back historically, if you're thinking of it in terms of the serf class, yes.

TESTIMONY OF JOHN EATON

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A. Ten years.

Q. Did you have contact with the illegal Mexican alien and the illegal alien student then?

A. Yes, I might even go back to '48-'49. At that time I was with the Harris County Probation Department in the Delinquency and Dependency Section and left there as supervisor of that. I did have some contact with children who had been involved in certain difficulties, so I was aware that we did have this type of child that we term as a juvenile in our community. Perhaps the next more direct contact was in 1955 and 1960, which was predominantly – at that time we referred to them as Latin American. We call these children Hispanic now, but this was about sixty percent with a school enrollment of from two thousand to twenty-two hundred, a three-grade junior high, seven, eight and ninth grades.

When you say illegal aliens at that time I don't think we used the term. Most of those children were *migrants*. They were passing through our community. They had perhaps worked in the Valley, had moved on up. They had relatives in Houston. They would appear at our school, and we had no regulation or any-

thing that prevented these children from coming into our school at that time, so we would enroll these children. The length of stay depended on their parents, where they would be moving, to what location they went in the future.

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Q. If those four to five thousand illegal aliens were added to your district, would that have an impact on your costs and on your programs?

A. Well, definitely, it would be a cost factor, and the thing I guess – if I might digress just a minute, if the court will allow me – the thing that really concerns me is that only four percent of our professional staff at present is Hispanic or could really be termed bilingual. For the past three years we have attempted to recruit all over the United States to accommodate those children who are legally eligible within our district, to define their needs, screen test and bring them up to achievement that would meet the federal guidelines in the federal case and our own Senate Bill 121 in Texas, so it costs, just projecting what I gave a moment ago, a thousand students would be another $1,740,000.00, if they avail themselves of each of these services, if they were in a school where they could get a Title I program and get $25.00 per child for clothing, so it would impact, if we had more Hispanic children coming in – right now we're attempting to take care of some nine thousand that have been identified in Grades K through 3, and if you were to extend it on to pupils who have been identified through the twelfth grade, you're looking at fifteen thousand, perhaps, who would need some type of special types of programs to bring their efficiency up to what we would expect of the average class, so, definitely, any one or more impacts would add to the cost.

Q. Has it been your experience in your contact with the illegal alien students that he would need this assistance in terms of bilingual assistance and other specially funded educational programs?

A. Well, let me draw on an experience that I have actual knowledge of. When I was at the junior high school with the migrant child, who I assumed was here through legal channels to be a migrant farm worker, these children would come over with very little formal education. Because of the age that I would receive them, these children would be fourteen, fifteen or some sixteen years of age. They were not even performing on even a second or third grade level in formal education. How many years they had been migrating throughout the United States I could not say, but we would attempt – I had at that time some Latin American – that's the terminology we used – I would place these children in these classes where we could have a two-way dialogue and give the children books, and most of them were eager to learn. This, I think, would carry over to the legal alien, the twenty-six identified that we know about in the Hernandez suit – the Ledezma suit has been resolved, and these children are in school and are making progress. I hope I haven't expounded too much here.

Q. That's fine. Would there be an impact on other students in the classroom, if these illegal alien students were added to the Houston I.S.D.?

A. Any time you add, let me say, ten children to a class that already has twenty-five or thirty, you are compounding or you are expecting more out of this teacher. Our bilingual – we have a hundred twenty-three bilingual teachers as of this week. Most of them have a bilingual aid, and these people in the classes that I have visited – I have not visited all – but the ones that I have visited, I see the children in there –

now, these are the legal children in classes that we are teaching today – at a much lower grade level for the most part, because we do have a migratory factor from twenty to fifty percent in some of the elementary schools. Some of these kiddos have just moved in from all over the United States, and, definitely, you are imposing on this teacher one more child.

Our duty is to educate. We have no problems or difficulty with this, but we do have only so many people that can get around and assist only thirty or thirty-five in a class and assist and help give them the security that they might need.

Q. Does the illegal alien bring with him into the classroom unique or special educational problems?

A. Yes, for personal experience, as I stated, the child is usually overaged and oversized, has social problems. He compensates for not participating quite often. In other words, he doesn't want to show that he doesn't know this before the smaller children. I had considerable difficulty with some, as far as the older child, let's say, creating a disturbance with a smaller child, taking his lunch money or trying to be a hero or developing a gang around him for acceptance, whatever. In other words, he just has not grown per grade per year and really gone along, and his social development has been actually disturbed, hindered.

[page 269]

Q. Now, between 1974-'75 and '75-'76 did the H.I.S.D. have occasion to reduce its administrative staff?

A. I don't recall that, sir.

Q. It would be your belief that they did not reduce it?

A. I don't recall other than retirees, but I don't believe we have reduced them. If we did, I'm not familiar with it.

Q. Between 1974-'75 and the following school year did the H.I.S.D. reduce its teaching staff?

A. Our teaching staff has continued to grow because of the special type programs. Each year it has increased. I do not have that information with me, but it has gained a few, fifty or a hundred each year, sir.

Q. Now, H.I.S.D. has a fairly extensive bilingual program, doesn't it?

A. We have got a very active bilingual department. It's limited because of number of staff, perhaps, but we are expanding. We have proposals. We are thinking in the future, making projections of our needs.

Q. In fact, the number of students who are participating in the bilingual program has increased yearly over the last four or five years, has it not?

A. Well, for the three years that I have records here – we would actually go back prior to that – we would assimilate these children to a situation where it would be most conducive to their education, where they would have a bilingual situation, so it has increased, yes, sir.

Q. Mr. Eaton, there has been previous testimony by two school finance experts that there are primarily two major groupings of costs that go into a school budget. The first major grouping would be essentially fixed costs, maintenance and debt service and various things of that sort, and the second would be instructional costs. For a rough breakdown is that fair?

A. That's a fair statement.

Q. The two experts which I referred to have also testified that the exclusion of students from a district has little, if any, impact upon fixed costs, *i.e.*, the costs that remain fairly constant. Do you essentially agree with that?

A. Sixty-nine children we have now that we know are legal would have little adverse (sic) in our total budget. I'm talking about only sixty-nine, because we have a mobile population, we have a gain and loss every six weeks. At the end of each quarter we graduate seniors. That reduces our enrollment, and our enrollment will probably end up around two hundred thousand at the end of this year, so at the rate of last year of $3.54 (sic), it will go down a little below – October is our peak. It has been consistent, and then it gradually declines.

Q. Let me sort of pinpoint – your testimony concerning cost per pupil, you divided the number of students into your total school budget, did you not?

A. That is the way I arrived at this Exhibit No. 5, sir, the court exhibit (sic).

Q. Now, for example, the exclusion of say a given student would not necessarily save the school district that amount of money, would it?

A. This budget is constant. We have to live with it. It's put into T.E.A.'s office before the 1st of August by state law, so we have to live within that budget unless it is amended, which is also a state-controlled routine.

Q. You get certain sums for every so many students, do you not, from the state? Isn't there a formula?

A. Yes, sir.

Q. The formula roughly is you get the equivalent of one teacher for every twenty students?

A. Not exactly, sir. This last Legislature, if I may read from the Texas Register, I believe of October 11, 1977, which is your official record for the State of Texas, there's a divisor of 19 for Grades K through three; 21 pupils four to six; 20 pupils seven to Grade Nine; 18 pupils ten to Grade Twelve. That is what is ideal, sir.

Q. And it is those figures that trigger state participation of state money?

A. They determine our foundation funding, yes, sir.

Q. Your foundation funding is dependent upon your average daily attendance, in other words, numbers of students in attendance. Is that right?

A. Let me go back to the budget for a minute and answer this a little more concisely. Revenues from local and intermediate levels is a hundred twenty-three million, and it reflected a two hundred forty-five million total, so about fifty percent would come from the state and another fifty percent from local taxation.

Q. Local taxation is primarily derived from property taxes?

A. Ad valorem taxes and this type of thing, yes, sir.

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Q. Now, from your experience is it fair to assume that most new migrants from Mexico, whether they are legal or illegal, can benefit from bilingual education?

A. Absolutely, sir. I would think that ninety-nine -- that may be high -- would need this training to structure their education to the regular classroom situation.

Q. This is irrespective of whether they are legal or illegal. It's the newness to the country, I would assume that triggers it.

A. I think that would be a fair statement, sir.

Q. Indeed, many children grow up in Houston and are born here who are in need of bilingual programming. Isn't that correct?

A. That reflects the culture within their respective families, that's true.

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Q. Not to denegrate local contributions, the major single source of money for the bilingual program in H.I.S.D. at the present time are federal funds, is it not?

A. No, sir. This year $2,372,809.00 is coming out of local taxation. $839,408.00 is federal funds.

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Q. You testified briefly earlier concerning overageness and the problems caused by having overaged children in a classroom, did you not?

A. That is correct.

Q. And you were talking particularly about migrant children at that time, were you not?

A. I was talking about migrant or children of Hispanic background coming from an elementary or feeder

school which was predominantly at that time Latin American, Hispanic now, moving into a junior high situation, and I base this, sir – our seventh grade counselor, I had instructed her to put these children into a category to see what they need, and we found that many of these children were two and three years behind. They were two or three years over normal grade placement, so we attempted to construct remedial classes to accommodate the needs of these children. Now, this is what I am talking about overaged that I have had experience with.

Q. But you weren't talking particularly and narrowly about undocumented alien children, were you?

A. I wasn't talking about anything except at that point in time the migrant that was over here legally, as far as I knew, a farm worker, and the Spanish child was a legal resident. We did not go into the identification as we go in now. In other words, the children came in, and they had the baptismal record, and the mother and father signed what was called eighth grade residence certificate that they lived within H.I.S.D. and were legal residents, and we assumed they were.

[page 281]

Q. You have been involved in education a long time?

A. Education has been my major endeavor, yes, sir.

Q. Education is a pretty important thing, isn't it?

A. I think it is one of the most important things we have in America.

Q. What is the effect of not receiving an education, being excluded from receiving an education today in the State of Texas?

A. Well, I think this is reflected by whatever our percentage of employment might be across the nation. Here's a person that has not gained a skill or does not have the ability to perform at some level of competency at some type of job, plus depriving this person of many of the basic privileges that we have in America, not knowing exactly how to exercise various rights, privileges and this type of thing, so education has a lot to do with what we do in America, sir.

Q. Would it be fair to say that you would cripple a person socially and economically, would you not, if you deny them an edication?

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THE COURT: You say no one has paid any tuition?

THE WITNESS: As far as I know, nonw of these illegal aliens, undocumented.

[page 288]

Q. Then you're talking about not being able to give the four to five thousand adequate education. Are you also talking about not being able to give citizens and legally admitted children an adequate education?

A. I'm saying that we are short on bilingual teachers now, like every place in the United States. Four percent of our teachers and twenty-two percent of our students are Hispanic.

Q. But would the four thousand to five thousand illegal alien students, if added to Houston I.S.D., adversely affect the education of legally admitted and citizen children?

A. Absolutely, but it would penalize these children that are attempting to get an education by taking needed time from this teacher in this bilingual class or in this classroom, who would have to spread himself much thinner in order to pick this child up. This child comes in with little formal education, no concepts, and to develop this child up to a performance level of proficiency, well, it's going to take someone in the classroom, and I don't think we have enough teachers. I don't think we have enough bilingual aids to accommodate this situation. It would adversely -- yes, the answer to your question would be affirmative.

Q. While it would have an adverse impact on Houston I.S.D. generally, would it have an even more adverse impact on the Mexican students in your schools?

A. Would you repeat that? Let me try to delineate here.

Q. Would the adverse impact be even greater on the Mexican legal student in your schools?

A. Mexican legal?

Q. Yes, students already there.

A. Yes, right. Maybe I didn't answer this a moment ago. It would take the time from this child who is a legal resident. This child would demand more attention. This child would be -- where we would have maybe twenty-five, or we would put maybe thirty-five or forty in a class. It would dilute or diminish the amount of learning to be performed in that class, so it would penalize this child, because I have been in classes where you have forty, and you can't do as well if you have four or five grade levels in there.

Q. It's the Spanish-speaking student, the Mexican American student who is in bilingual education who

would suffer if additional limited speaking English students were impacted into the school district, isn't it?

A. He would suffer, because we could not give him as much education per hour per day.

Q. And you can't find teachers.

A. And we do not have adequate teachers.

[page 295]

TESTIMONY OF DR. JIM BOB HENSLEY

Q. Dr. Hensley, would you please state your name and address for the record, please?

A. I am Jim Bob Hensley, and my address is 1301 East First Street, Mount Pleasant, Texas.

Q. Where are you employed, Dr. Hensley?

A. Region VIII Education Service Center in Mount Pleasant.

Q. Could you give the court a brief description of your educational background, please?

A. I have a Bachelor's Degree from the University of Oklahoma, Master's Degree from the University of Northern Colorado, and a Doctor of Philosophy Degree from Texas A&M University.

Q. Could you give the court also a brief description of your employment history, please?

A. Yes, I have been an elementary teacher, an elementary principal, and I was a program director for elemen-

tary education at the Texas Education Agency. I have been director of administration for Region I Education Service Center in Edinburg. I've been a part-time graduate professor at Pan American University, and now I'm Deputy Director at Region VIII Education Service Center.

[page 296]

Q. What areas of research or field of concentration in your education?

A. By being in the Valley education administration, primarily, and elementary education, and then in the Valley I did a fifteen-month research project on the impact of immigrant alien students from Mexico upon border school districts.

Q. Have you become familiar with other areas of Mexican alien impact and illegal alien impact, other than just your study?

A. Yes, through related research and reading, that sort of thing, and conversations with school personnel.

Q. What areas of inquiry were involved in this study that you conducted?

A. The impact on personnel, funding, as far as construction of buildings, programmatic areas and this sort of thing.

Q. What areas in terms of school districts did your study actually cover?

A. The thirteen counties adjacent to the Mexican border in Texas.

Q. And what did you find in terms of Mexican alien population in those counties?

A. In the sixty-one school districts located in those counties there were ten percent of the children had Mexican birth certificates.

Q. Is that high or low as compared to the rest of the state?

A. As Mr. Anderson testified earlier this morning, statewide it is 1.8 percent, and on the border in '75-'76 when I did my study, it was 9.6, right at ten percent.

Q. Did you find associated with that ten percent group educational problems?

A. Severe problems on children who were especially overaged.

Q. Could you explain those problems to the court, please?

A. Yes, the state-mandated bilingual education program generally was adequate for children in kindergarten through third grade, but after that students who were beyond that age, colleges and universities and school districts just do not train secondary personnel to deal with limited English-speaking students.

Q. In the upper grade levels, you mean?

A. Right, and in high school.

Q. Does that mean that the teachers are not available for that age level?

A. Not available or not trained.

Q. What was the result of your inquiry into the space needs or the adequacies of physical facilities in those school districts to house those students?

A. I personally went into all sixty-one school districts, and most of them were small, so in a lot of cases I got to look, you know, at each facility, and, comparatively speaking, as you get away from the border, I would say the facilities were atrocious.

[page 300]

Q. What are you talking about in terms of growth among the alien population along the border?

A. In the first – I don't know about growth. All I know is during the survey that I took in that one particular year where there were twenty-seven thousand students approximately with Mexican birth certificates, about twenty-two percent of those were there for the first year, for the first year in school, around six thousand or so, so from that we assumed that this was a growing problem, if they were first-year students.

Q. Is this a continuing phenomena, the large influx of alien students into those districts?

A. Yes. I'll have to go back a little bit in history. The superintendents expressed a concern to our organization in '75 that they were beginning to have problems with space. They were getting kids coming from somewhere, and, as best they could figure out, they were coming from Mexico legally, to the best of their knowledge, so the State Board then commissioned us to do a study of this problem, and we found out that in that one year that I studied we found these numbers, and then subsequently the Texas Education Agency has followed up on a year-by-year survey, and,

as you heard Dr. Anderson say this morning, they had grown in one year by six thousand, and that's statewide.

I am not familiar with what the growth was in those sixty-one schools that I studied.

Q. But you are familiar with the growth being more intensified in those districts than statewide?

A. Yes, I would think so.

Q. Are the educational needs of Mexican alien students affecting building space utilization that will be required from the district? Could you explain that more fully? We have talked about it some but—.

A. Well, in the high school – well, a lot of times for this type of intensive instruction a lot of time you have to have small groups of students, so, thereby, you know, you have more classrooms, more teachers, but our problem – and I say our problem – I don't live there any longer, but the problem the schools were having is that the construction, the cost of school buildings are financed totally by the local taxpayer, and here we have students coming from another country, a foreign country, into the state, impacting on what we thought to be and proved to be with this study an isolated area of the state. They were impacting on the border, and we were saying that this was unfair to the border taxpayers.

A national policy had permitted a flow of immigrants into the country, and a local school district was being penalized for that.

Q. Did you find a like increase in available tax monies in correlation with the increase of the alien student in the schools?

A. No, because according to my study, eighty-two percent of these students were on the free lunch program, meaning eighty-two percent of them were poor children, and poor people moving into the area do not build houses and these sort of things, which increases the property values of the district, which will support building space that they require in the schools.

Q. Did you find that the Mexican immigrant alien students affected the educational program of the district?

A. Sure, when you have large numbers, as we saw coming in to the regular program, you overcrowd classrooms. You dilute the tax dollars that would normally be in the educational program, and they've got to go to these students too, so the less resources available per child, you're going to get less quality education.

Q. For all the children?

A. For all the children, absolutely.

[page 304]

Q. If 21.031 were repealed, would there be an impact on the school districts in terms of illegal alien students seeking an education?

A. I think there would in the border districts. I don't know about this far up in the state as far as Tyler and that sort of thing, but along the border, yes. Education is an attraction, and I think the repeal of that law would attract more to the border school districts.

Q. What would be the impact on the citizen or legally admitted children who are in those border districts?

A. Of course, more of these students, it would dilute their education. You know, here again, you've got in that particular group of schools, you have the poorest in the state. By poorest I mean they have the lowest taxable property, amounts of property to support a child than anywhere in the state, and you make it attractive for more students to come into the districts without substantially raising the tax base to support them, then it will affect them severely.

[page 306]

Q. In your opinion would there be a substantial increase all along the border?

A. All along the border. Now, I don't know that there would be a substantial increase in migration, you know. It's hard to explain. The obrder is a permeable membrane. Of course, people go back and forth across the border because of family ties, cultural ties, and a lot of times they do not recognize the body of water there as being a political boundary.

Q. Within that short space education would be an attraction, particularly right there on the border?

A. Yeah, a lot of the parents say they want to immigrate to the United States, of course, legally, and one of the prime motivations, of course, is education.

Q. On the border is what you're talking about?

A. Yes.

Q. But just to summarize, is what the findings of your report were that education now in the border districts is at a minimal level, and then the addition of the illegal alien students would in many instances make it almost nil?

A. I don't know if I want to say nil, but the quality of education along the border is lower because of No. 1, the lack of facilities, and No. 2, lack of qualified personnel and money to do things. Yeah, and if you have an influx of some additional students, no matter whatever, sure, it's going to lower the quality of education.

Q. For those children and legally admitted who are now in the schools?

A. Right.

[page 307]

CROSS-EXAMINATION

BY MR. ROOS:

Q. Mr. Henseley, the basic source of your knowledge about the border problems and the migration problems in the border areas derives from the study you conducted in '75-'76, does it not?

A. Yes, sir.

Q. And that study expressly only purported to measure the impact of legal resident alien migrants on the school districts, did it not?

A. That's correct.

Q. Have you ever formally taken a survey of the number of illegal aliens who would be admitted to school in the event that they would be permitted to attend schools in those areas?

A. No.

Q. Have you ever taken a formal survey indicating whether education is or is not a primary motivating factor for people coming across the border?

A. Not a formal survey, no, sir.

Q. Have you ever known a school district that didn't feel it needed more resources?

A. There are some isolated cases of budget-balanced school districts that have oil wells and minerals and that sort of thing, but, generally, no.

Q. I don't mean to denegrate the problems in the Valley—.

A. I know.

Q. —but everyone feels that they could use some more resources, don't they?

A. Yes, sir, but let me hasten to say that the Valley schools are pretty well documented that they need more, compared to the rest of the state.

[page 314]

Q. The two things you primarily identified caused by this migration were the housing problem and dealing with the child who was in the upper grade level. In fact, did you not conclude insofar as younger children, forgetting for a moment about the housing problem, that the needs of the recent migrant – we're talking about the permanent resident alien now as defined by your test – differed only minimally from those other children in the school district?

A. Along the border where eighty percent of the population is Mexican American, seventy-five to eighty per-

cent, then the educational program is pretty much the same.

Q. The needs are essentially the same?

A. I would say so, yes, sir, educational needs.

PLYLER V. DOE EXHIBITS

PLAINTIFF'S EXHIBIT 6
DECEMBER 12 and 16, 1977 TRANSCRIPT
J. and R. Doe et al. v. *James Plyler et al.*

TAX
REVENUE SOURCES

Omnibus Clearance
Fund (120)
production and
consumer taxes
$867 million

Foundation School
Fund (193)
$473. million
from Omnibus Fund

Motor Fuels Tax
Fund (060)
$109 million

General Revenue
Fund (001)
sales and utilities
taxes $591 million

Available School Fund (002)	
from Omnibus	$393 million
Interest on investments	85 million
from Motor Fuel tax	109 million
	$588 million

(Plaintiff's Exhibit 6 *cont'd)*

General Revenues
Fund (002)
$591 million
from General
Revenues

TOTAL STATE EXPENDITURES
FOR EDUCATION =
$1.6 BILLION

FUND ALLOCATIONS

Data Source: Comptroller's Annual Report, 1977
Tables 16, 33, 35, and 37

Detail 1

Omnibus Clearance Fund -
Direct and Indirect
Consumer Taxes

Direct Consumer Taxes	**(in thousands)**
Utilities	58,483
Telephone	39,672
Admissions	1,208
Liquor	33,814
Wine	3,018
Ale	1,120
Telegraph	99
Beer	47,665
Motor Vehicles - rental	6,988
Motor Vehicles - sales	321,303
Insurance Premiums	118,302
Amusement Machines	1,376
Total Direct Taxes	633,088

Indirect Consumer Taxes

Oil Production	436,434
Gas Production	474,754
Total Indirect Taxes	911,188
Total Direct and Indirect	1,544,276
Total Omnibus Allocations =	1,804,880
Percent of allocations passed to consumer	85%

Source: Comptroller's Annual Report, 1977 Table 35

Detail 2

General Revenue Fund - Consumer Taxes

	(in thousands)
Total Revenues	2,022,997
Less non-consumer taxes	
Franchise Tax	236,612
Inheritance Tax	66,568
	303,180
Balance - direct or indirect consumer taxes	1,719,817
Percent of taxes paid by consumer	85%

Source: Comptroller's Annual Report, 1977 Table 7

B-93

BOOK 1

PLAINTIFF'S EXHIBIT 7

DECEMBER 12 and 16, 1977 TRANSCRIPT

J. and R. Doe et al. v. *James Plyler et al.*

1977 ANNUAL FINANCIAL REPORT
of
The State of Texas

for the fiscal year ended
August 31, 1977

BOB BULLOCK
Comptroller of Public Accounts

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN 78774

November 7, 1977

The Honorable Dolph Briscoe
Governor of Texas
The State Capitol
Austin, Texas 78767

Dear Governor Briscoe:

The State's fiscal year ended August 31, 1977 was, again, a record year for both revenues and expenditures for state government.

Revenues and an opening cash balance of $9.00 billion supported expenditures of $7.02 billion, leaving a net cash balance of $1.98 billion. This cash balance, also a record figure, was $336 million more than the cash balance at the beginning of the fiscal year.

This favorable position was made possible by record revenues from all major sources, including $4.42 billion in tax collections, $1.85 billion in federal funds, $372 million in licenses and fees, $279 million in investments of state funds, and $341 million in income from state owned land.

This report details revenues and expenditures for 1977 as required by Article 4348, R.C.S. of Texas.

Respectfully submitted,

BOB BULLOCK
Comptroller of Public Accounts

BOOK 2

PLAINTIFF'S EXHIBIT 7

DECEMBER 12 and 16, 1977 TRANSCRIPT

J. and R. Doe et al. v. *James Plyler et al.*

JULY 1977

BIENNIAL REVENUE ESTIMATE 1978-1979

Bob Bullock - Comptroller of Public Accounts

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN 78774

July 8, 1977

The Honorable Dolph Briscoe
Governor of Texas

The Honorable Bill Hobby
Lieutenant Governor of Texas

The Honorable Billy Clayton
Speaker of the Houst

Members of the 65th Legislature

Ladies and Gentlemen:

As the 65th Legislature comes into special session, our state government again finds its bank book blessed with a healthy bottom line balance.

The outlook for the future of that bottom line is always subject to change, and by this estimate I am increasing

my last estimate of the money available to the Legislature during the coming two years.

In the few short weeks since my last estimate significant changes have been dictated by state government actions. The changes based on these actions do not reflect any basic change in my forecast of general economic conditions.

The dust has now settled on the accomplishments of the Legislature's regular session and these acts, along with revisions in key public school funds, are major factors in the changes I have made.

I will now certify that $959.8 million will be available to the Legislature in general revenue funds during the remainder of this 1977 budget year and the 1978-79 budget years. This is an increase of approximately $60 million in general revenue from my last estimate. This estimate also shows an increase of $4 million in dedicated funds.

Changes in four basic areas have brought about these changes in the estimate.

First, by a series of new acts, now firmly fixed in law, the Legislature reduced our expected revenue collections for the coming two years. But second, by the same token, in the final appropriations actions the Legislature left a significant amount of money on the table in anticipation of a school finance bill.

Third, since the end of the regular session, the Foundation School Budget Committee has reduced their estimate of the needed support for the Foundation Program by $15 million from the budgeted estimate used in the appropriations bill.

Finally, the continuing shift of Permanent School Fund investments to higher yielding securities permits me to increase by $27.5 million my estimate of the earnings the Permanent Fund will provide to the Available Fund during the next two years. This revision is the only change in which general economic conditions have been a factor in my estimate.

(Plaintiff's Exhibit 7—Book 2 *cont'd)*

Delivery of this estimate fulfills the constitutional requirements of my office on the opening of the called session, but it in no way completes my willingness to work with the leadership of this state and the members of the Legislature on the tasks at hand.

Submitted in compliance with House Bill 5, 57th Legislature, First Called Session.

Sincerely,

BOB BULLOCK
Comptroller of Public Accounts

DEFENDANTS' EXHIBIT 6

THE IMPACT OF STUDENTS FROM MEXICO UPON SELECTED SCHOOL DISTRICTS IN TEXAS COUNTIES ADJACENT TO THE MEXICAN BORDER

A Research Study
by
JIM BOB HENSLEY

Submitted to: The State Board of
Education and the Texas Education Agency

Funded by:
Region One Education Service Center,
Edinburg, Texas
Charles W. Benson, Executive Director

September 1976

Table 3.—Number and Percentage of Mexican Immigrant/ Alien Students Enrolled in Texas Border School Districts during the 1st Quarter of 1975-76.

County District	Enrollment 1st Quarter	Number of Immigrant/ Aliens	Percentage of Immigrant/ Aliens
Brewster			
Alpine ISD	1,288	4	.3
Marathon ISD	175	11	6.3
San Vicente CSD	13	0	0
Terlingua CSD	15	0	0

Table 3 (Continued)—Number and percentage of Mexican Immigrant/Alien Students Enrolled in Texas Border School Districts during the 1st Quarter of 1975-76.

County District	Enrollment 1st Quarter	Number of Immigrant/ Aliens	Percentage of Immigrant/ Aliens
Cameron			
Brownsville ISD	22,618	3,125	13.8
Harlingen ISD	11,785	590	5.0
La Feria ISD	1,756	101	5.8
Los Fresnos ISD	2,296	111	4.8
Point Isabel ISD	1,655	77	4.7
Rio Grande MHMR ISD	116	0	0
Rio Hondo ISD	1,280	43	3.4
San Benito ISD	6,464	378	5.8
Santa Maria ISD	290	56	19.3
Santa Rosa ISD	857	64	7.3
South Texas ISD	439	35	8.0
El Paso			
Anthony ISD	390	34	8.7
Canutillo ISD	1,825	280	15.3
Clint ISD	807	87	10.8
El Paso ISD	62,884	5,988	9.5
Fabens ISD	1,632	187	11.5
San Elizario ISD	400	36	9.0
Socorro ISD	2,864	564	19.7
Tornillo ISD	312	69	22.1
Ysleta ISD	40,851	3,184	7.8

Table 3 (Continued)—Number and percentage of Mexican Immigrant/Alien Students Enrolled in Texas Border School Districts during the 1st Quarter of 1975-76.

County District	Enrollment 1st Quarter	Number of Immigrant/ Aliens	Percentage of Immigrant/ Aliens
Hidalgo			
Donna ISD	4,622	467	10.1
Edcouch-Elsa ISD	3,298	193	5.9
Edinburg ISD	9,915	513	5.2
Hidalgo ISD	1,005	273	27.2
La Joya ISD	2,719	389	14.3
LaVilla ISD	500	11	2.2
McAllen ISD	14,346	1,759	12.3
Mercedes ISD	3,945	283	7.2
Mission ISD	6,553	565	8.6
Monte Alto ISD	305	56	18.4
Pharr-San Juan-Alamo ISD	11,593	956	8.2
Progreso ISD	472	112	23.7
Sharyland ISD	1,317	117	8.9
Valley View CSD	185	5	2.7
Weslaco ISD	7,200	469	6.5
Hudspeth			
Allamore CSD	5	0	0
Dell City ISD	372	58	15.6
Ft. Hancock ISD	252	66	26.2
Sierra Blanca ISD	165	0	0

Table 3 (Continued)—Number and percentage of Mexican Immigrant/Alien Students Enrolled in Texas Border School Districts during the 1st Quarter of 1975-76.

County District	Enrollment 1st Quarter	Number of Immigrant/ Aliens	Percentage of Immigrant/ Aliens
Kinney			
Brackett ISD	604	63	10.4
Maverick			
Eagle Pass ISD	7,078	1,477	20.9
Presidio			
Candelaria CSD	12	0	0
Marfa ISD	694	7	1.0
Presidio ISD	545	112	20.6
Ruidosa CSD	13	0	0
Starr			
Rio Grande City ISD	4,210	455	10.8
Roma ISD	2,847	606	21.3
San Isidro ISD	398	16	4.0
Terrell			
Terrell County ISD	381	2	.5

Table 3 (Continued)—Number and percentage of Mexican Immigrant/Alien Students Enrolled in Texas Border School Districts during the 1st Quarter of 1975-76.

County District	Enrollment 1st Quarter	Number of Immigrant/ Aliens	Percentage of Immigrant/ Aliens
Val Verde			
Comstock ISD	11110.5		
Juno CSD	5	0	0
San Felipe-Del Rio ISD	8,724	938	10.8
Webb			
Laredo ISD	20,160	1,723	8.5
Mirando City ISD	135	12	8.9
United ISD	2,512	96	3.8
Webb Consolidated CSD	211	0	0
Zapata			
Zapata ISD	1,403	105	7.5
Grand Total	281,845	26,940	9.6

Table 4.-- Number of Texas Border Districts and Percentage of Mexican Immigrant/Alien Students Enrolled during the 1st Quarter of 1975-76

Percentage Enrolled	Number of Districts	Percentage of Districts
0	9	14.7
0.1-0.9	2	3.3
1.0-1.9	1	1.6
2.0-2.9	2	3.3
3.0-3.9	2	3.3
4.0-4.9	3	4.9
5.0-5.9	5	8.2
6.0-6.9	2	3.3
7.0-7.9	4	6.5
8.0-8.9	7	11.5
9.0-10.0	2	3.3
over 10.0	22	36.1
TOTALS	61	100.0

Table 5.-- Age of Mexican Immigrant/Alien Students Enrolled in Texas Border Districts during the 1st Quarter of 1975-76

Age	Number of Mexican Immigrant/Aliens	Percentage
5	72	.3
6	747	2.8
7	1335	5.0
8	1642	6.1
9	1826	6.8
10	1941	7.2
11	2195	8.1
12	2356	8.7
13	2403	8.9
14	2368	8.8
15	2440	9.1
16	2385	8.9
17	2042	7.6
18	1553	5.8
19	1042	3.9
20	444	1.6
21	120	.4
22	29	.1
TOTAL	26,940	100.0

Table 7.-- Number of Years Mexican Immigrant-Alien Students Were Enrolled in Texas Border Districts

Year	Number of Mexican Immigrant/Aliens	Percentage
1	6104	22.7
2	5308	19.7
3	4293	15.9
4	2797	10.4
5	2241	8.3
6	1691	6.3
7	1264	4.7
8	1062	3.9
9	749	2.8
10	588	2.2
11	377	1.4
12	326	1.2
13	100	.4
14	22	.1
15	17	.1
16	1	.0
TOTAL	26,940	100.0

Tabel 16.-- Enrollments of Texas Border Districts with Large Populations of Mexican Immigrant/Alien Students during the 1st Quarter of 1975-76

School District --	First Quarter Enrollment	No. of Mexican Immigrant/ Aliens	% of Mexican Immigrant/ Aliens
Brownsville	22,618	3,125	13.8
McAllen	14,346	1,759	12.3
San Felipe-Del Rio	8,724	938	10.8
Eagle Pass	7,048	1,477	20.9
Donna	4,622	467	10.1
Rio Grande City	4,210	455	10.8
Socorro	2,864	564	19.7
Roma	2,847	606	21.3
La Joya	2,719	389	14.3
Canutillo	1,825	280	15.3
Fabens	1,632	187	11.5
Hidalgo	1,005	273	27.2
Clint	807	87	10.8
Brackett	604	63	10.4
Presidio	545	112	23.7
Progreso	472	112	20.6
Dell City	372	58	15.6
Tornillo	312	69	22.1
Monte Alto	290	56	19.3
Ft. Hancock	252	66	26.2
Comstock	114	12	10.5
TOTALS	78,563	11,211	14.3

Table 19.-- Ethnic Make-Up of Texas Border School Communities Having Large Populations of Mexican Immigrant/Alien Students Enrolled during the 1st Quarter of 1975-76

School Community --	Percentage of Mexican-Americans	Percentage of Anglo-Americans	Percentage of Others
Brownsville	89	10	1
McAllen	80	19	1
San Felipe-Del Rio	57	40	3
Eagle Pass	95	5	0
Donna	90	10	0
Rio Grande City	98	2	0
Socorro	84	15	1
Roma	98	2	0
La Joya	95	5	0
Canutillo	80	19	1
Fabens	85	15	0
Hidalgo	98	2	0
Clint	58	42	0
Brackett	60	30	10
Presidio	96	4	0
Progreso	95	5	0
Dell City	45	55	0
Tornillo	78	22	0
Monte Alto	95	5	0
Santa Maria	100	0	0
Ft. Hancock	96	4	0
Comstock	55	45	0
AVERAGE	83	16	1

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

JOINT APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

* * *

NO. 80-1538

* * *

JAMES PLYLER, Et Al.
V.
J. AND R. DOE, Et Al.

* * *

NO. 80-1934

* * *

STATE OF TEXAS, Et Al.
V.
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et.al.

VOLUME C

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DOCKET ENTRIES

DISTRISCT COURT:

11/21/79 Multidistrict Panel Opinion And Order, filed.

12/20/79 Preliminary Hearing.

1/11/80 Motion Of United States For Leave To Intervene As Plaintiff, filed.

1/21/80 Defendant's Motion To Join The United States as a Third-Party Defendant, filed.

2/1/80 Order, It Is Hereby Ordered That The United States May Intervene As Plaintiff In This Action, filed.

2/1/80 Plaintiff Complaint Is Intervention By The United States, filed.

2/11/80 Joint Pretrial Order, filed.

2/13/80 Order, Filed. The State's Motion To Bring In The United States As A Third-Party. Defendant Denied.

2/19/80 First Day Trial.

7/21/80 MEMORANDUM,filed. Parties notified. LBN/ks
1. Defendant State Motion To Dismiss-DENIED.
2. Plaintiffs Motion For Partial Summary Judgement-DENIED.
3. Plaintiffs Motion To Proceed As A Class Action-GRANTED with respect to issue litigated in this consolidated proceeding; transferor courts should con-

sider separately whether plaintiffs claims against various school districts for damates should be maintained as class claims.

CLASS DEFINITION: All children who are over five and not over 21 years of age at the beginning of the scholastic year and have been or will be denied admission to the public schools in the State of Texas on a tuition-free basis because of the alienage provisions of § 21.031, Texas Education Code.

7/21/80 ORDER, filed. Parties notified. ks
1. Plaintiff's request for a declaratory judgment-GRANTED. Commissioner of Education and agents ARE ENJOINED FROM:
A. denying benefits of Available School Fund to any children who are over 5 years and under the age of 21 years on the first day of September of any scholastic year on account of their status under United States immigration law.
B. refusing to permit children who are ober the age of 5 years and under the age of 21 years on the first day of September of the year in which admission is sought to attend the public free schools of the district in which they reside on account of their status under United States immigration law.
C. refusing to permit children who are over the age of 5 years and under the age of 21 years at the beginning of the scholastic year to the public free schools of the district in which they reside free of tuition on account of their status under the United States immigration law.

7/28/80 Defendants State of Texas Notice of Appeal to Order Entered July 21, 1980, filed.

5TH CIRCUIT

7/30/80 Date Docketed.

2/23/81 Filing Order Granting Appellees' Motions For Summary Affirmance.

3/2/81 Filing Appellants', State of Texas And Texas Education Agency, Notice of Appeal To The United States Supreme Court.

3/13/81 Filing Appellants' Amended Notice of Appeal To The United States Supreme Court.

3/20/81 Judgment As Mandate Issued To Clerk

February 19, 1980
VOLUME V

TESTIMONY OF DR. GILBERT CARDENAS

TESTIMONY

In Re Undocumented
Alien Children Litigation

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Q. (By Mr. Torres) Would you please state your name for the record?

A. Gilbert Cardenas.

Q. Dr. Cardenas, would you please state your present residence?

A. I am living at 2415 Dwightway, Apartment 3, Berkeley, California.

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Q. I am looking at the Avante Study right now, which was just introduced into evidence as one of government's exhibits. It's also marked as defendant's exhibit.

It's defendants' Exhibit 2-3.

In that study, it indicates that, and you have referred to Professor Gilbert Cardenas' study with Flores from San Antonio before.

A. Yes, ma'am.

Q. It indicates here that they surveyed 100 undocumented respondents in San Antonio and in the Texas labor market.

And it says they were between the ages of eighteen and thirty-four years of age, most were married mailes, 55.5 percent of them had no formal education, 19.2 percent had grade range from first to third grade.

It went on to say that in the San Antonio study, forty-one percent of the respondents working in construction, twenty-three, the wholesale and retail trades, and, further, that Professor Cardenas interviewed undocumented persons who were not apprehended, said the average wage was two-fifteen per hour for all industries.

The Avante Study goes further. It then reviews the Cornelius Reports, which you have testified to, the contents of that to some extent.

And they say a familiar demographic profile emerges from the Cornelius Study, the undocumented person would be between twenty-seven and twenty-nine and the majority had not attained beyond the third or fourth grade in the educational level, and the hourly wage from two-fifty to three dollars for those in agricultural occupations and four to five in factory jobs.

THE COURT: Just a moment.

MR. SCHEY: May I approach the witness and give him a copy of this?

What page?

MS. DASHER: Page nine.

Q. (By Ms. Dasher) Are these again reports that you have relied on in giving your opinion to the Court?

A. Yes, they are.

Q. And do you have any quarrel with those particular statistics?

A. Generally, no. In that it is pointed out, they are the only empirical evidence that we have had on this population group.

I am generally in agreement with the consistency of findings between these studies and that they also do not contradict the findings that we have generated through our own research.

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Q. Now, all of the reports that you have cited generally give us a picture of illegal immigrants as a person with very limited amount of prior schooling.

Do you agree with that?

A. Yes.

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Q. It also indicates that when you are dealing with the group of persons that come in from Mexico, you are dealing with much more, a much lower educational exposure than you are when you are dealing with immigrants from other countries.

Do you agree with that?

A. Yes, that's right.

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TESTIMONY OF DR. THOMAS P. CARTER

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criminality, ward to the court, any number of other conditions. Almost all – I don't know how far I want to go on this one – but let's say that almost all the negative conditions of the society are positively associated with low education.

Now, I don't want to say that's universally the case with every human being, but has a statistical relationship.

Q. In your opinion, is there any effective substitute for formal education in this society today?

A. No.

THE COURT: How do you know that?

THE WITNESS: That's a good question.

THE COURT: Have you read the book, "The Overeducated American"?

THE WITNESS: Yes.

THE COURT: What do you think about that?

THE WITNESS: I think there is a point, Judge Seals, where the overcredentializing of people, the overeducating of people beyond the requirements of the system, economic and social

separately, but it does not involve the concept of using the language or the culture as a bridge to English and the American culture.

Q. Dr. Carter –

A. I should mention a bilingual teacher or aide, whoever is in the classroom, at least one of them should be literate in the language of the children, the other language, and should, of course, speak that language.

Now, that's quite – that's the other extreme from English as a second language, extreme where the teacher nor the aide need to be proficient in that language.

That was important to add.

Q. Dr. Carter, the State of Texas is arguing in this case that undocumented alien children should not be enrolled in the Texas public schools because of the lack of resources to provide them effective bilingual education.

In your knowledge and experience as an educator, what could be done to cope with these children?

A. Well, starting with the extreme and, if you will, the thing that perhaps I personally would prefer, would be high quality bilingual education. High quality bilingual education involves more than content and technique. It involves high expectations and all those other things and high quality of things.

In reality, that's not the world that we live in, although many places could implement a bilingual program, a good one, but for whatever reasons, chooses not to.

Given this situation, there are one hundred and one things a school could do, some of them probably would involve practically no training of that staff, perhaps none because so many people have so much skill in it already.

I have seen programs where they take immigrant children and merely pair them off with an English speaking child. Of course, all this depends on age and so forth and so on. They make every effort within the school to make this child comfortable within the social setting in which they operate. They give ever evidence of understanding that children don't learn to read simultaneously with learning to speak and don't push the reading with children who don't speak the language. Many cases where an aide within a classroom, and, I don't know about Texas, but in California I am going to guess that ninety-five percent of the schools where these kind of kids would go would be Title I schools and would have aides and community people available; that through the aide or trained community people, they begin to establish particular pull-out programs for these kids.

I am particularly impressed by a district near the border in California, Chula Vista – it's an elementary district – where they train parents to become the aides, volunteer aides to work with English as a second language, skills and developing those kinds of skills.

Q. Actually train parents to work with the children?

A. Yes. It would be perfectly possible, and I have never seen this done, I am sure it has been done, to take high school students and with a modicum of training, put them into a voluntary situation in the elementary schools. I have seen this done, but not with English as a second language or with English skills.

I have seen it done with other kinds of aiding in the classrooms. In fact, I evaluated one of these programs years ago and the amazing thing was the quality of improvement of achievement of the children from the high schools, kids from the high schools that were working in the other schools. Any number of pull-out programs to a reading Spanish or to just a speech teacher who has been given certain skills would be certainly useful.

Sharing team teaching arrangements where you could have a one bilingual teacher, say Spanish-English speaking in the classroom with a person who is not, who's English dominant or monolingual in English. This kind of arrangement has been accomplished to development fullfledged bilingual programs in Nogales, Arizona where they teach team teaching and three aides teach them. They even have the capability, although I am sure it's not necessary, of bringing in additional people and so forth.

By using language experience approaches to the development of curriculum, which was definitely the case in the United Consolidated School District in Texas prior to the middle '60's, the beginning of the '70's, it's possible to construct your own materials using the life experiences of children so that the contents become appropriate.

One of the real misnomers or, not misnomers, pieces of misinformation people have is that to develope an appropriate program for the population is terribly expensive.

United Consolidated in developing the first complete bilingual program in Texas, outside of Laredo, I do not believe spent one extra cent.

Carlsbad School District in California, north of San Diego, which is about one-third Spanish-English bilingual, I mean the program, initiated the program with a transfer of $1,000 to the curriculum materials.

United Consolidated did not buy any curriculum materials. They made them.

The ex-associate superintendent of that district, who was with the Texas Education Agency, in discussing it with me, indicated that was one of the reasons for the

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So what we are getting when you look at the study, assuming, and I agree with Ms. Dasher that I am not a demographer, I do think that I know something about Mexican-American dropouts and to assume that the children that are Hispanic, the children that are left over that are not accounted for in the drop, in the official dropout rate or undocumented children overinflate the number of undocumented kids because two-thirds, I am guessing, I have no way of – I would suggest that only one-fifth to maybe two-fifths of the dropouts are ever considered officially recognized dropouts.

What we have done is inflate the number in the basic equation. I have no way of knowing how much.

But if the basic assumption is right, that I am making, and the basic assumption is wrong that the study made, then the figures are wrong.

Q. (By Ms. Swanson) Excuse me, Dr. Carter.

When you say the basic assumptions made in the study, are you referring now to the defendants' study, the Criterion Analysis Study?

the cost of overall education in the State of Texas as opposed to the exclusion of any other group?

A. No, no. In fact, one would have to be an expert to answer on dollar-centswise, and I would hesitate to do so. But the exclusion of the undocumented will affect the finance of schooling the same way the exclusion of blue-eyed blondes would affect the finance of Texas.

Q. So, in your opinion, there is nothing unique about undocumented students in terms of –

A. I can't think of anything unique about them. In fact, I bet you if we lined up a random assortment of the undocumented children and compared them with the documented Hispanic kids, that we would have to be experts to tell the difference.

Q. Doctor, in your opinion –

A. Maybe the children don't even know, for that matter. The child is the unconscious product of or conscious perhaps as he grows older, product of what his parents did. It is not the fault of the child that his parents are undocumented.

I can almost make biblical illusions on that one.

Q. You testified earlier about bilingual teachers'

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TESTIMONY OF DR. KENNETH L. MATHEWS

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help her.

I can understand you trying to help the court.

But we have got the witness here so why don't you move into what you want him to testify to?

MS. SWANSON: Thank you, Your Honor.

Q. (By Ms. Swanson) Dr. Matthews, how important do you feel the school is in influencing a child's emotional outlook and development?

A. I feel that the school and education are probably one of three major areas in a child's development.

Q. What would you say the other major areas are?

A. I also see the family and the physical environment in which a child is reared as being a significant variable along with education.

Q. How would you expect a child to be affected emotionally from being excluded from school?

A. I would expect the child to exhibit some psychiatric difficulties, of which there are several different kinds that the child might exhibit.

Q. Could you please give us examples of psychiatric difficultues which you might expect to occur?

A. They -- one of the types would be behavioral problems, that children who are deprived of education frequently suffer behavioral difficultues which can vary in extent from mild adjustment difficulties through serious behavior difficulties, like hyperactivity, withdrawing behavior into fairly severe types of difficulties such as depression and breaks with reality.

Q. How would you expect these children who are excluded to differ from children who are allowed to go to school intellectually or cognitively?

A. I feel that there is, that when a child is not allowed to be educated, that there is a decrease in the cognitive functioning of the child and in the ultimate ability of that child to develop adult type thinking patterns.

Q. Could you give the court an idea of how long this exclusion process would need to continue in order to have severe consequences?

A. I would think that exclusion for a year or two would produce some effect. The longer the exclusion goes, the more severe the effect would be.

Q. I see.

Would you expect any changes in these children's development of moral values or acceptance of society's norms as a result of their being excluded from school?

A. Yes, I would. The school setting alone with the family are major determinants for the socialization of the child and for the development of moral values.

And a child that is not educated would be limited because of lack of exposure to one of these major areas.

Q. What results could there be to his moral values?

A. Frequently the children will be unsocialized, will have decrease in social abilities, will not have stability in their personality, some of the moral determinants that we prefer for a citizen in our society to have.

Q. Dr. Matthews, you mentioned the child's relationship with other persons, specifically his family as another major influence on the child's development.

What effect would you expect the child's exclusion from school to have on his relationship with other family members?

A. With respect to syblings, I believe that there is an alientation and a distancing between the child and his syblings that would become increasingly greater and frequently this may be eventually acted upon as some hostility between syblings.

Q. Consider the situation of a family in which one child, perhaps a younger child, was born in the United States and is therefore a citizen and can attend school, and there is another child who perhaps was born while the family was still living in Mexico, therefore, that child cannot attend.

So we have a family in which one child can attend and the other child cannot.

What results could be expected to occur here?

A. I think the child who is excluded from education may perceive himself to be less good or to have a lower personal worth or a lower level esteem and that because of the exclusion, he sees himself in a less advantageous life.

The sybling who is educated may, on the one hand, perceive themselves as somewhat better than the child who is excluded in some circumstances; in other circumstances, I think that the child who is educated can become anxious about why he got certain benefits that the syblings don't get, sort of why he is so special more and above the other children.

Q. Suppose a child realizes that his exclusion from school is due to his parents' immigration status or his parents' status as being undocumented?

What effect could this be expected to have on his relationship with his parents?

A. Although initially some children may be somewhat happy at being excluded, I think that over the growing up years, there will become a pervasive antagonism that develops that the parents did not provide the education that the child then sees other people in his environment as obtaining, particularly when the child grows up and finds that he has difficulty in a number of difficult areas because of the lack of education.

Q. Suppose the child realizes that he might be able to attend school if his parents could pay tuition but his parents cannot afford the tuition.

How would you expect this to affect the family relationships?

A. Well, again, if the child is excluded from school he may feel a certain animosity towards his parents for not having provided the educational experience.

There is also the possibility that the child might feel guilty that he has placed his parents in such a position that the tuition funds are required, that the

parents seem unable to do things for the child that the child may perceive that the parents want to do.

Q. What effect would you expect a child's exclusion from school to have on his social relationships, his relationship with other children?

A. I would find that the exclusion from school would be inhibiting to the social interactions on one hand because the child who is excluded from school is seen as being different and this would prompt a sense of differentness between the kids who are going to school and the kids who are not and would produce some difficulty, sometimes harassment of a verbal or physical nature, sometimes kind of a cold shoulder approach that leaves the child feeling that he is different and an outcast.

Q. What would you expect the thought processes of other children to be towards children who are excluded from school?

A. I see two major issues about that. One is that the children who are going to school will think less of the children who are not, that they are somehow different from the children who are going to school and that prejudice will develop basic to that noticable difference.

A second thing that may occur is that the children who are going to school may see that some children are excluded from school for reasons that are not entirely clear to the children who are going to school, and that because of this, they may develop some animosity that the stable society which is presented to them will not perhaps be that stable and that someday in the future, they may be excluded on the basis of some grounds that they are not aware of.

Q. Dr. Matthews, have you had occasion in your own practice to treat undocumented children who have not attended school for periods of time?

A. Yes, I have.

Q. Have you found that any of these children have suffered psychiatric difficulties?

A. That's the basis for their having been to see me, was for psychiatric difficulties that they had.

Q. Could you summarize for the court the types of psychiatric problems that you have personally found in your own practice with undocumented children?

A. The problems that I often see relate to issues of self-esteem and to depression and to hyperactivity and to learning disabilities related to that.

THE COURT: What's the name of this phenomenon you're talking about?

THE WITNESS: Of problems developing.

THE COURT: Well, isn't there a term that they use in psychology?

For instance, like Jewish children that are raised in America and when Christmas comes along, all their friends are celebrating Christmas by many ways, toys and Santa Claus and all that, you know.

THE WITNESS: Yes. There is certainly a sense of alienation for some children that they have a different way of doing things.

THE COURT: What do you call whenever a minority in culture is denied to participate in the socialization of the culture?

Isn't there a terminology used in psychology for that?

THE WITNESS: I am not acquainted with that specific term.

THE COURT: I am not either. That's why I'm asking. There ought to be a term for that.

THE WITNESS: There have been positive changes when the issues of Jewish heritage plus Mexican-American heritage have been incorporated, like in the school system, with things that are typically Anglo-American. It provides a certain sense that all of the individuals are contributing to the culture represented by the school system.

THE COURT: There should be a term for that.

THE WITNESS: There may well be.

THE COURT: So we will know what we are talking about.

It's the same thing that any minority person in any culture, because of his culture, is denied the right to participate in what is universally accepted, the trauma of being excluded or excluding yourself because of certain beliefs you hold.

THE WITNESS: Yes.

THE COURT: There must be a term for that, that trauma, as you say, affects the child.

THE WITNESS: Yes. I don't know what the specific term is. I am sure there is one in sociology somewhere.

THE COURT: I have never seen one.

What was it Sam Goldman said, exclude me out, don't include me in, or exclude me in, or something?

THE WITNESS: Yes.

THE COURT: It's a similar situation, isn't it?

THE WITNESS: Yes. It really represents a lot of the minority difficulties when one is not allowed culturization privileges.

THE COURT: I see young people, graduates from a law school that can come to work in a big law firm and they have a feeling that they are not really accepted and included because they didn't go to, say, the University of Texas Law School, but they went to another law school and they developed a psychosis of being excluded, even though they might not be excluded, but they would have this psychosis about it.

THE WITNESS: Yes.

THE COURT: What's that called?

THE WITNESS: Sometimes it's generally called an adjustment reaction of psychotic proportions. The psychiatric –

THE COURT: Give me a shorter world. You need a six-letter word.

Go ahead.

MS. SWANSON: Thank you, Your Honor.

Q. (By Ms. Swanson) Dr. Matthews, you were mentioning a moment ago some of the different kinds of

problems that might result to kids who are kept out of school.

Could you list in psychiatric terminology the different kinds of things that might happen here to these kids?

A. The different diagnoses that might be given to these children?

Q. Yes.

A. Some of the milder ones would be adjustment reactions. And then there are some more severe ones that include things like hyperkinetic reaction of childhood and adolescence, withdrawing

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whole.

Q. How about personality disorders?

You mentioned that as something which might occur.

What would the symptoms of that be?

A. The personality disorders are a lifelong attitude that a child has about their coping mechanisms. They may develop a way of looking at life in a superficial sense or in a very obsessive sense that precludes looking at the overall picture, but only seeing details or may in fact be dependent or similar things like that.

Q. Would you expect children who have suffered a reaction of psychosis or severe personality disorder to be able to get along in our society as adults?

A. I think that they are severely hindered in their ability to do so.

Q. How does society attempt to deal with these people?

A. Well, as these people become older, they will have difficulties in their employment; they may have difficulty getting along with society's rules or regulations; they may have difficulty providing a stable living environment for themselves or their family; and because of this, they may end up overrepresented in the criminal justice system, overrepresented in the welfare system, or overrepresented in the unemployed.

Q. Would you say that these children are more or less likely to be, these people, I'm sorry, are more or less likely to be institutionalized at state expense than persons who have been allowed to attend school?

A. I believe they are more likely to be institutionalized than children who have been provided an adequate education.

Q. Would you say they are more or less likely to be imprisoned at state expense than children who have been allowed to attend school?

A. I believe they are more likely to be imprisoned.

Q. Dr. Matthews, in summary, what chance do children who are excluded from school for their entire life have to become emotionally healthy or economically self-sufficient adults?

A. I believe their ability to become healthy adults and self-sufficient adults is limited by the fact that they have not acquired an education.

Q. How limited?

will — that the children who are going to school will somehow in the future be excluded as well or treated in a less adequate way than they are currently being treated.

I think that another factor is that the children who are in school will polarize themselves with the children who are not in school to produce an attitude of less acceptance of children who are not in school.

Q. In your experience with various cognitive emotional behavior practices that you have been talking about, what differences have you encountered among Mexican-American citizen children, documented Mexican children and undocumented Mexican children?

A. I feel that the group, three groups are fairly equal.

While there are some individual variations in each of the groups, I feel that overall the three groups are generally consistent with each other.

Q. In other words, as to learning ability, you would not find any differences?

A. Right. I do not see any of the groups being especially advantaged or especially disadvantaged in a basic biological sense.

Q. Thank you, Doctor.

THE COURT: Give your name and who you represent.

MR. WILSON: Greg Wilson with the Attorney General's Office.

I am representing the defendants.

THE COURT: Now, then, speak slowly and keep your face in the microphone.

(Discussion off the record.)

February 26, 1980
VOLUME X

TESTIMONY OF MR. LEONEL J. CASTILLO

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THE WITNESS: Yes, sir.

Q. Could you please state your name for the record and spell your name, please?

A. My name is Leonel J. Castillo. L-e-o-n-e-l J. C-a-s-t-i-l-l-o.

Q. Could you please explain your association with the Immigration and Naturalization Service and the time period of that association and what position you held?

A. Between the period of May 13, 1977 through October 1, 1979, I was the Commissioner of the United States Immigration and Naturalization Service.

Q. And could you just describe for the Court briefly what responsibilities the Commissioner of the Immigration and Naturalization Service holds?

A. The Commissioner is responsible for the administration of the Immigration and Nationality Act, responsible for the day-to-day operations of that agency and answers directly to the Attorney General of the United States.

Q. Could you state approximately what the budget is of the Immigration and Naturalization Service, where it gets that budget and how it is determined, where or how the budget will be spent?

In other words, if you could explain a little how priorities are set within that budget?

A. The Service has an annual budget, approximately three hundred million dollars.

The historical emphasis of the Immigration Service has been to place roughly 70 percent of that money in what are termed enforcement activities, that's essentially Border Patrol, investigations and some inspection activity.

The other percent of the budget, 30 percent or so goes to what are commonly called service or adjudicative functions and these have to do with office administration processing of immigrants and refugees and other nonenforcement activity.

The process by which the dubet is developed is that process used by the president in conjunction with the Congress.

The President, upon the advice of the Department and other members of the Executive Branch, especially the Office of Management and Budget, presents a budget to the Congress, the Congress debates it, usually passes a budget similar to that one he presented, and then the President in some rare instances may veto a category or a section of it.

But the process is the traditional budget process for federal agencies.

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Q. Approximately what total number of Border Patrol officers are located either at the borders or at the various ports of entry into the United States?

A. On an average shift, the Immigration Service has about 90 percent of all Border Patrol officers on the southern border, and what that means is that on an average shift, we have approximately 250 officers to cover the 2,000 miles of border from Brownsville, Texas to San Diego, California.

Q. In order to completely or almost completely seal the southern borders, what type of enforcement activity do you think that would take, and do you believe that policy makers at the present time believe that it would benefit the United States interests to totally seal off the southern border?

A. There have been no requests and no recommendations made by any part of the United States Government to Congress or the Executive Branch to seal the border.

There have been a number of requests made to more effectively enforce existing laws.

But the idea of sealing the border is more something that's discussed in theory than in fact because the world's busiest border is the border between the United States and Mexico with more daily crossings recorded through ports of entry than between any two countries anywhere in the world.

Q. During your tenure as the Commissioner of the Immigration and Naturalization Service, did you become aware of or did you become privy to positions or documents which indicated a policy of maintaining a

flexible southern border in order to provide an escape valve for the unemployment in Mexico or, alternatively, to allow the flow of cheap labor into the United States?

A. I know of no official documents that state that.

There is obviously the defacto case where with 250 officers you cannot seriously discuss full enforcement of the immigration laws.

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Q. And in terms of the urban industrial sectors which employed undocumented workers, what do you believe, based on your experience, to be the primary motivation for the utilization of that labor force?

A. I think that they work hard, they usually work for less, and, or can work for less, they are more exploitable or manipulable as employees and for many industries, many employers, it's an ideal labor force.

Q. Going back for a moment to federal law: Is it true that on numerous occasions various types of amnesties have been introduced in Congress which would allow certain portions of the undocumented population in the United States to remain here as permanent residence?

A. There have been many bills introduced that would have granted adjustment of status, and amnesty in your terms, to persons who are already here and were out of state.

None of these have passed.

Q. At the same time, have there been bills introduced which would implement an employer sanction law on a national level?

A. These also have been introduced and, similarly, they have not passed.

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Q. Of those persons who enter unlawfully, approximately what percentage do you believe are coming to cities or locations where they have family members already residing?

A. You have to be – let me preface my remarks, my answer, by saying that all of the figures on undocuments are very imprecise and all we can give you are estimates and sometimes they are guesstimates and sometimes they are not even that good.

But, a study conducted by the Immigration Service last year indicated that, together with some studies in Mexico that concluded the same way, that Mexican Nationals who were coming to the United States tended to come from particular villages, particular monosperios and then flow in very direct lines into particular locations in the United States, and members of the Border Patrol will often tell you that people from the particular village will tend to end up in a particular location in Houston.

So you will find a lot of family members at one time or another in one or the other locations.

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Q. (By Mr. Schey) Could you explain where the primary enforcement activities take place other than along the border within the United States and perhaps more precisely, if you could explain whether enforcement activities take place in residential communities, in schools, in factories, if you could be that precise and explain to the Court the current thinking of the Immi-

gration and Naturalization Service in this regard?

A. I will try to be brief.

Essentially, the Service feels that it's more cost effective and much less troublesome than many other ways to try to apprehend people as they are coming into the country.

So the bulk of the resources are located at the border.

slhIn the interior of the United States, primarily in the major urban areas and in a few selected farm areas in California and a few other places, the Service has forces of investigators and in a few cases Border Patrol officers who also try to make apprehensions of persons already here.

The policy has been developed that we will primarily or the Service will primarily concentrate its resources in apprehending and then deporting where possible those persons who are felt to be taking jobs that could be held by United States citizens.

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Q. What would it take in order to effectively enforce the Immigration Act as it exists on the books today, and I am not talking about one hundred percent enforcement. That's probably an ideal.

A. I think that you could double the size of the enforcement activity function and of the service function and you could make a substantial dent in the problem with that increase.

But doing so without changing the law would probably create new problems and maybe as serious as the ones we would have now.

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on what we want.

Q. Are you aware, approximately, of what the present backlog is because of the quota system for immigration, for potential immigrants from Mexico, people who have already filed some kind of paperwork?

Just very roughly, what is the backlog in terms of numbers and years?

A. There are over a quarter of a million Mexicans who are currently awaiting entry to the United States as immigrants.

And when you realize that there are twenty thousand numbers per country per year in the best of cases for legal immigrants, we are often speaking of a seven year wait.

Q. Do you find — did you find as the Commissioner of the Immigration Service that many persons who were seeking documentation, who are on the waiting list, would tend to come to the United States to wait, even though they would come here unlawfully, rather than to wait in the sending country or in Mexico?

A. We had a number of cases that individuals, especially in what's called second preference, a Mexican National marries a Mexican residing in the

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Q. Do you find or do you believe that there is a type of conflict between the service side and the enforcement side of the Immigration and Naturalization Service to the extent that the more money that you put into law enforcement, the less money you have available to assist people in the documentation process?

A. Well, I indicated earlier that Border Patrol on an average shift has 250 officers over 2,000 miles.

The service side of the Immigration Service is equally strapped and on many days, such as yesterday here in Houston, the office on the fifth floor of this building was so jam packed with legal applicants, that they had to close it at 10:30 because there was no place to put anyone else.

Q. 10:30 in the morning?

A. 10:30 A.M. Because there was no more room in the building, in the facility.

That is not a typical in the United States.

We are witnessing perhaps the second largest influx of immigrants, legal immigrants in the history of the country and, depending on what is done about the undocumented, we could very well be witnessing the largest influx of immigrants in the history of the United States.

Q. You indicated a little earlier on that you felt that in essence the United States had already granted an amnesty to undocumented persons in the United States.

Could you expand on that thought a little, please?

A. What I said was that there is a de facto amnesty, certainly not an official policy.

But when you contend with immigration and documentation in the State of New Mexico with three investigators for the entire state, you have to come to the conclusion that you are not going to deport everybody in New Mexico who could be deported. That's what I mean by the de facto situation.

Further, when the number of investigators is reduced by one tenth in this year's budget, you have to come to the conclusion that it seems to be a de facto situation, that the efforts to root them out are going to be much more difficult.

Q. Do you believe that the notion of a de facto amnety is essentially a nationwide phenomena or do you believe it's just limited to certain states or portions?

A. The pressure is nationwide, but they are especially felt in the Sun Belt, and I am including there the entire West Coast of the United States and some of the urban areas, so it's rather stretched through the Sun Belt.

That's where the majority of the new immigrants are settling is in the Sun Belt.

Q. Would you include the State of Texas in your notion of a de facto amnesty?

A. Oh, certainly.

Q. What do you believe to be the policy reasons behind this type of de facto amnesty?

A. The primary reason it's used in the Congress and in the Executive Branch is money, that there is no more money to hire more Federal employees because the Federal bureaucracy is too big and that there is not going to be more money for a while and that seems to be the primary reason. At least, that's what I kept hearing at all the budget hearings and in the Congress.

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have spent here.

So, clearly, a family unit is much, usually is much more imbedded in a community than a single male who lives in a house with 20 young men.

Q. And would that fact contribute to the results whereby it would be less likely that that family would be successfully deported from the United States?

A. It would be much more difficult, much more difficult to deport a family unit than it is to deport single males.

Q. I may ask a couple of questions on the notion of deportation for a moment.

What is the purpose of the deportation hearing in the context of immigration law?

A. The hearing is held to make the determination as to the deportability.

If you could compare it to a local police situation, the officer arrests someone and charges him, then a local judicial process makes the actual determination of guilt or innocence.

Similarly, an immigration judge makes a determination of deportability or not.

Q. Is that sometimes a complex factual question?

A. Oh, yes. There are cases that are very complex.

Q. Are there cases in which it becomes a complex legal determination?

A. Oh, yes. We have many lawyers who make a living representing clients and who work in this area profession.

Q. Do you also have lawyers who make a living representing the Service?

A. We have lawyers on both sides.

Q. Do you believe that a high school principal with no formal training in immigration law could accurately and consistently determine whether or not a child is deportable from the United States?

A. Without training, I can't imagine that they would have many people who could make such a determination.

Q. Am I also correct in understanding that even if an Immigration officer believes a person to be deportable from the United States, that Immigration officer can make no decisions which would negatively impact on that persons life other than to initiate a deportation hearing?

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power along those lines?

A. The officer can recommend bond be posted or can prosecute more vigorously and put limitations on a person's movement, but an officer may not, shall not, cannot make a decision of deportability.

Q. While you were the Commissioner of the Immigration and Naturalization Service, what did you learn about the way in which undocumented families in the United States are treated by employers, by landlords, by merchants, et cetera?

A. Well, the undocumented in general is more exploitable and more vulnerable than any other group in the United States.

The undocumented family similarly is more exploitable.

But I believe that the undocumented family unit, it's hard to get factual evidence, is less exploited, less vulnerable than the single adult men.

Q. Could you give us some examples of the type of exploitation which you either heard about or learned about while the Commissioner of the Immigration Service?

A. They range from direct economic exploitation, that is certain employers who say that you may work here,

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decisions, Congressional actions?

A. The process changes and the format and the forms change continuously.

Q. How difficult would it be for the Immigration Service to take the educational system of a particular state, such as the State of Texas, and to take on the burden of not only keeping all of your own employees informed of changes in the law, changes in the forms, changes in the operations and instructions, changes in the regulations, et cetera, but to also keep an entire educational system aware of those changes?

Is that something you feel the Immigration Service could take on with its present budget?

A. No. The Service can barely maintain its own activities. It would just not be very practical to look to doing the same with other large institutions.

Q. To your knowledge, is there any other state in the Union which currently finds it desirable to exclude certain undocumented children from the public schools other than the State of Texas?

A. I don't know of another state. I understand there are some, but I don't know.

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Is that correct?

A. That's correct.

Q. What is your experience in how difficult or how easy or how rapidly indigent people unfamiliar with the workings of the State have in obtaining those documents?

What is your general experience?

A. Well, it's very difficult in many cases. It's complicated even further if you are coming from a sending country which may not have very many Xerox machines or which may not have ways of reproducing documents or which does not really keep very good records or which has had a revolution and all the documents have been burned or lost or where, for some reason, no one recorded some of the sigificant events.

So there is continuous, constant documentation problems with many, many countries, including parts of the United States.

Q. So, in my example, if the father was having problems getting some of these state documents, which he needs to even go down to the Immigration Service and file his papers, it may take him, as I understand your testimony, a fairly sigificant amount of time to

even gather the preparatory documents to take even the first step in filing with the Immigration Service.

Is that correct?

A. Collecting of the supporting documents can be very difficult.

Q. And, finally, when that person finally takes his little girl down to the Immigration Service and says, here I am, I am a United States citizen, I want to file an application to immigrate my little girl, what is the likelihood that the Immigration Service would deport that girl from the United States?

A. It's very unlikely.

Q. You think it's less than--?

A. Remote.

Q. Remote?

A. Yes.

Q. Fine.

Thank you, sir.

MR. SCHEY: No further questions, your honor.

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Q. This may be slightly out of order, Mr. Castillo, but I wanted to do something with a couple of defendant's exhibits.

We testified about the position of the economic persons, employers with respect to the laws about criminalized employer hiring.

You indicated that some employers were opposed to that, did you not?

A. Yes, I did.

Q. You are also aware that there are other groups which are opposed to that provision being put into law?

A. Oh, yes.

Q. And one of those groups would be the Mexican American Legal Defense Fund, would they not?

A. That's true.

Q. And have you seen what has been marked as Defendants' Exhibit 14-26, The Mexican American Legal Defense and Education Fund Statement or Position Regarding The Administration of Undocumented Aliens Legislative Proposal?

A. Yes, I have.

MS. DASHER: May I approach the witness, your honor?

THE COURT: Yes.

Q. Now, if you would turn to page 68 of that document and would you read the paragraph that's marked there?

A. It says: "Policy considerations: considering first the policy implications of the proposals -- believe that's adoption would unavoidably lead to widespread employment discrimination against ethnic Americans in general and Mexican Americans in particular. Faced with the statute making it illegal to hire undocumented workers, some employers would be over

zealous in their actions and would refuse to hire anyone whom they suspected of unlawful entry – however unfounded the suspicion and regardless of the proof of legal residence provided, other employers would react in a like manner and out of a desire to avoid all risk of a Justice Department lawsuit with its attendant complications, financial costs and adverse publicity."

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Q. You talked about de facto amnesty.

It's true, is it not, that the United States Government holds the strings in terms of making someone's status in this country legal or not?

A. That's true.

Q. They can grant the right to vote.

True?

A. Congress.

Q. Congress can?

A. Yes.

Q. Congress could provide benefits of the Social Security Act, could they not?

A. Certainly.

Q. They could provide the benefits of all the welfare system and Medicaid, AFDC, could they not?

A. They could.

Q. In fact, they could create a powerful class out of what is now a powerless class, could they not?

A. They could.

Q. They have not, have they?

A. By inaction, I think they have allowed it to develop.

Q. In effect, the United States and the United States Congress has by its failure to act created a very powerless subclass in our society, have they not?

A. I think that's true.

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REDIRECT EXAMINATION

BY MR. SCHEY:

Q. Do you believe that excluding children from school will serve to institutionalize and simply perpetuate the exploitation of undocument persons already suffering in the United States?

A. I think that the exclusion will continue, will continue their status as a vulnerable group, as a powerless group, will serve to continue it.

Q. As those children grow up, if they remain in the United States, do you think it will increase their general vulnerability?

A. I think there is no question but the people that are illiterate will be much more vulnerable.

Q. Do you think it will incidents of exploitation?

A. Probably increase the likelihood.

Q. To your knowledge, it there any – strike that –

While the Federal Government has apparently decided that undocumented persons should not participate in certain Federal welfare programs, to your knowledge, is there any Federal law in the area of education which seeks to exclude undocumented children?

MS. DASHER: Objection; no foundation, no showing that he has reviewed all

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TESTIMONY OF UNNAMED WITNESS #2

[page 7-35]

UNNAMED WITNESS NO. 2

CALLED TO TESTIFY BY THE PLAINTIFFS, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

[page 7-41]

Q. Sir, where did you and your family reside before entering the United States?

A. Rio Bravo, Tamaulipis in Mexico.

Q. Is that a small village or town in Mexico?

A. Yes. It's a small town.

Q. Were you born there?

A. No. My wife was born there.

Q. Where were you born, sir?

A. In Jalisco.

Q. Did you attend school in Mexico, sir?

A. Yes.

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Q. How many years did you go to school in Mexico, sir?

A. Just until the second grade.

Q. Since you have been in the United States have you been returned to Mexico by the Immigration authorities?

A. In 1975 once.

Q. Was it just you or did your whole family return?

A. Everyone. The family.

Q. How long did you remain in Mexico?

A. One month.

Q. How did you return to the United States?

A. A friend of mine took my car down to Mexico and I came back with my whole family.

Q. When you came back did you intend to remain in the United States?

A. Yes. That's why I came back.

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TESTIMONY OF SISTER EMILIANE CARDENAS

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Q. (By Mr. Schey) Could you state your full name for the record, please?

A. Emiliana Cardenas.

Q. Sister, could you please tell us if at the present time you work with the children of undocumented people here in Houston?

A. Yes, I do.

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Q. How many people do you find, how many families do you find who have children enrolled in the schools, how many leave the United States and return to live in Mexico?

Have you had that happen to many people?

How many families has that happened to?

A. I have not heard of the families returning to Mexico, but I know of some children who return to Mexico when they cannot get the education or the instruction they need, the parents send them back to Mexico. I lost about three the first semester.

Q. That is because their parents sent them back to Mexico?

A. To be educated, but the parents remained in the United States.

Q. Have you seen any cases of children leaving the State of Texas to go with the family to some other state where they could obtain an education?

A. Not out of the state. They have tried to go out of the cities, to other cities like San Antonio or the Valley, somewhere in the Valley.

Q. Is it your understanding that some, that in some cities they will allow these children to enroll in the schools and in others they will not?

A. Some families told me that in the past in the Valley, for example, Weslaco or McAllen, Harlingen, maybe, they were taking children, undocumented children.

Q. So you find sometimes a family would move from one part of Texas to another part of Texas?

A. Yes.

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TESTIMONY OF DR. GLORIA ZAMORA

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arts have traditionally played a very important role in any bilingual program.

Then, in this kind of arrangement, then, you have teachers who are teaming and who are able to share the responsibilities and who are able to give the students everything that they need in the way of language services.

Now, recall also that resource people may be a part of the team. Parents who volunteer from the community are marvelous additions to this kind of team; teacher's aides that are paid from various souces are a marvelous addition; student teachers from the university make marvelous additions to this team.

I have participated in this kind of teaming arrangement in the past and have helped school districts develop that kind of teaming arrangement.

Do you have any questions on this before I discuss one more?

Q. I will get into some other questions as soon as you finish there.?

A. The important thing to remember about that model and the other model that, one of the important things to remember about that is that we are never changing the ratio of students to teacher. It remains within the boundaries determined by the State of Texas right now, at one teacher for each twenty-ive students in average daily attendance.

THE THIRD MODEL: This model is actually a variation of the one that I have just described and the variation there is that we have, the reality of the situation is that we don't have open space and may not even want open space for all teaching, all of the instruction that goes on.

So, this is a team teaching model in what I call a self-contained or closed space, architecturally closed space. Okay.

Again, this can be a two teachers and two classrooms team or three teachers and three classrooms teaming.

I will do the two by two model.

In this one, we have this classroom and right next-door to it, we have the other classroom.

This is a mixture of children here, bilingual children, students of

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THE WITNESS: Thank you.

A. If we were to use only a self-contained model, the very first--

Q. (By Mr. Guajardo) That was sheet number one.?

A. Sheet number one.

I would prefer if you would be kind enough to repeat your question.

Q. My question was would the quality in bilingual education be defused or would it be adversely affected by the increase in the number of limited English proficiency students?

A. My opinion is that if we significantly increase these numbers and it is in a self-contained model where one teacher has full responsibility for doing all the teaching, we might adversely affect any kind of teaching program if the numbers were significantly increased.

But if we use the team teaching model that I diagramed on sheet two and three, then I think that you can see that we would be using the staff in different ways, not increasing the student ratio, therefore providing for the addition of additional numbers of limited English proficiency students without changing the student-teacher ratio which, therefore, in my

TESTIMONY OF MARY McKINNEY GALVAN

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effectively.

One of the basic strategies that any ESL teacher learns is how to work in small group instruction.

What that means is that then rather than organizing an ESL class that has only one student or four students, it's possible to have a class of twenty students divided into five groups of four students each. Small group instruction is vital to the effective teaching of ESL.

Q. If an ESL program or bilingual education program in Spanish was initiated in a school, would that inhibit or prevent the school in any way from offering other foreign language, such as French or German for those U.S. citizen students wanting to learn such a foreign language?

A. No, I see no reason why it would.

Q. Would programs for limited proficiency students utilizing English as a second language methodology, would they be adversely affected by an increase of limited English proficiency students?

A. Shouldn't be at all. And I would fight very hard to keep the quality of services to limited English speakers in all areas of the curriculum as high as

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attention that everybody, every teacher in the school be aware of what the needs of the limited English speakers are and be trained in how to meet those needs.

When we are talking about impacting the school with, I believe you gave 25,000 hypothetically, 25,000 students, then one of the things we need to face is we don't know what percentage, but it would be a fair guess of mine that less than half of those children are going to be anywhere near what we would call non-monolingual Spanish speakers.

MS. DASHER: Objection, move to strike, your honor. She is way beyond her own expertise again.

MR. GUAJARDO: I believe that this is stated in a hypothetical and strictly within the hypothetical.

THE COURT: I am going to let it in, Ms. Dasher, and give it whatever weight it deserves.

MS. DASHER: All right, Your Honor.

THE WITNESS: Yes.?

A. It's inconceivable to me that all of those 25,000 children are going to be absolutely monolingual Spanish speakers. Many of them are going to be already speakers of English to a certain extent.

To be sure, they are not going to be able to follow the lecture of a teacher in English with the native control of an English speaker, but with some help, they can go on with their cognitive development while they are learning English. They are not going to be zero English, which means we are not talking about massive help for every one of those children.

I think we ought to be talking about motivating appropriate resources based on the fact that the children who are zero English are going to have much greater needs than children who have some English.

But children who are even halfway up the scale between zero English and native speakers of English are going to need some assistance in the classroom, they are going to need some help.

But it need not be costly, and it need not be massive help.

Q. Just one more question.

TESTIMONY OF DR. ALBAR PENA

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Q. And in your experience as a teacher in bilingual education, did you have any experience in dealing with undocumented children?

A. Yes, yes, I do.

Q. Please state whether these children who are undocumented, whether those children had any needs that were distinguishable from other children in terms of bilingual education.

A. No, they didn't. They are essentially the same.

Q. Would bilingual education programs be adversely affected by an increase of limited English proficiency students?

A. Not in my opinion.

Q. What ways could we deal with increase, sir?

A. There is different ways of doing with different staffing patterns we have to employ where we would use team teaching approach, where we have a monolingual teacher and bilingual teacher or monolingual

teacher with bilingual teacher aide, we have all the children from all the grades coming in and doing tutoring, and we have parent volunteers as well.

Q. Do you have experience with the State mandate for bilingual education?

A. Yes, I do.

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Q. In your experience in dealing with undocumented children, would a significant proportion of those who are undocumented necessarily need bilingual education?

A. It would depend again on their experience and background, what kind of formal education they have had prior to entering public schools here.

In essence, not all of them would need bilingual education.

Q. Would the increase of additional limited English proficiency students statewide result in an increase in classroom size which would have detrimental effects on the quality of bilingual education?

A. Not if we apply the differentiated staffing pattern that I have stated before.

Q. Have you had experience at an institution of higher learning in the recruitment of students into bilingual educational programs?

A. Yes, I have.

Q. — Teacher programs?

A. Yes, indeed.

Q. What efforts, what can be done to increase the pool of bilingual education teachers in Texas?

A. Certainly a greater incentive in retaining the

TESTIMONY OF EDWARD E. RANDALL

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EDWARD E. RANDALL,
called as an adverse witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHEY:

Q. Would you please state your current position with the Texas Education Agency?

A. I am the Director of Audit.

THE COURT: Are you calling this witness as an adverse witness?

MR. SCHEY: Yes.

Q. (By Mr. Schey) For how long have you been the Director of Auditing?

A. Since January 1, 1967.

Q. Am I corrrect in understanding that the Auditing Department of the Texas Education Agency determines the number of ineligible students that a school may have enrolled during the school year?

A. No. The Audit Division would merely take a look at attendance as reported by–

Q. My question, sir, was does the Auditing Division determine the number of ineligible students enrolled in the Independent School Districts?

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It lists a number of different reasons why a person may be found to be ineligible to go to the public free schools?

A. That's correct.

Q. And is one of those reasons and the final reason listed at the bottom of the page "an illegal alien"?

A. That's correct.

Q. Could you tell us if the Texas Education Agency, through either the Auditing Division or through any other division, has assessed the physical impact of undocumented children on the public schools subsequent to enactment of Section 2103-1?

A. I can only really answer for the Auditing Division, no.

Q. The Auditing Division has not done that.

Is that correct?

A. That's correct.

Q. Has – subsequent to the implementation of Section 2103-1, has the Auditing Division been able to determine how many students were moved out of the public schools as a result of the implementation of Section 2103-1?

A. No.

Q. Based on all of your experience as Chief of the Auditing for Texas Educational Agency, do you have any idea whatsoever as to how many undocumented children were removed from the public schools or kept out of the public schools as a result of the implementation of Section 2103-1?

A. No.

Q. Other than the two documents which you presented to me at your deposition, have any other documents on the alienage provisions of Section 2103-1 been presented to the auditors who work for you on this question, on the particular question of aliens?

A. Maybe on a piecemeal basis in that it would be individual letters to schools, but I couldn't tell you exactly which ones without going back.

Q. To your knowledge, there is no other policy positions issued statewide on the qeustion?

A. No others generally.

Q. It would just be the two which have been introduced into evidence?

A. Yes.

Q. Other than the two documents which have been introduced into evidence, are you aware of any other documents which the Texas Education Agency has sent out statewide to all of the schools

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Is that correct?

A. Yes.

Q. In the sense the institution or implementation of Section 2103-1, which is give years ago, how many schools have been audited in the past five years by your employees, just approximately?

A. Approximately?

Q. How many a year are audited?

A. Eight hundred, approximately.

Q. Is that the total over the five year period?

A. I would say the total, yes.

Q. Eight hundred schools.

During those audits, how many reported incidents have you personally heard of in which an undocumented alien was discovered to be going to school?

A. None.

Q. You haven't heard of any?

A. None.

Q. How about the other grounds for ineligibility?

Have you heard about students being – is there any other grounds of ineligibility in which you could say you haven't heard of any instances of a student being found ineligibility?

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its own policy?

A. Each district could have its own policy of the type of documentation required, yes.

Q. You are saying the Texas Education Agency has not required a consistent policy throughout the state?

A. This has always been left up to the local school.

Q. Now, I thought a moment ago you said TEA had just issued a whole set of regulations.

A. Those are not regulations that are presented on the two letters.

These are information letters on the type of documentation that could be available.

Q. Didn't you just testify that something was recently published in the Texas Register?

A. All I have seen is a list and I am not really knowledgeable as to the contents of that. I have just seen it. I am aware it does exist in the Register.

Q. Is that list mandatory or discriminatory?

A. I can't really answer. I would have to look at it.

Q. What do you instruct your auditors?

Do you tell them you have to follow this list or do you tell them you can either follow it or not follow it?

A. If it is a State Board policy, an established State Board policy, we would pick it up and assimilate it to the auditors.

Q. Is it mandatory or discriminatory?

A. This would be the type of listing, as I understand it, where they would look to see if specific types of documents may be on file in a district.

Q. Is it your understanding that the Independent School Districts have to follow those regulations or is it your understanding that they are free–

A. I still do not have that particular knowledge of this regulation. I just do know that it has been presented in the Register and whether it's law or not, a regulation or not, I can't answer that. I don't know.

Q. In terms of what you can say, as I understand it, is that up to now you are not really sure what's happening in the future, but up to now it has been a decision of individual school districts precisely the degree to which they either conform or not conform to the two letters we just introduced.

A. On the type of documentation required, it's been up to them.

Q. Now, what, in light of that, you would go to the school district if you wanted to conduct an audit of this question and you would find out what their policy is.

What is the next step that you would take?

A. We would look at whatever documentation would be available to see if they were following the policy.

Q. Precisely what would be the first step that the auditor would follow in order to determine if the school had allowed children in in violation of Section 2103-1?

A. To look at the individual records of students.

Q. What would they look for in the individual? Would

they just look at all the records in the school? Or how would they do that?

A. Well, I couldn't really answer this. This would depend.

Q. Do you recall in your deposition stating they would most likely look at the Spanish surnames?

A. Well, I don't know if it would be most likely or not.

Q. Do you recall saying that in your deposition?

A. I said it could be, that could be one thing.

Q. How do you think they would do it, tell us, if

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certificates.

Q. How would abolishing the need for census have anything to do with maintaining birth certificates?

A. The census was required for schools' last particular population.

Q. We are discussing birth certificates right now because the Commissioner of the Texas Education Agency told me that the first thing we do is go look at birth certificates.

Are these wrong?

I want to know if he is wrong, if this happens some of the time?

I just want to know if it happens some of the time?

How often in the past five years has your auditors looked at birth certificates of children in the school?

A. I can't answer that. I don't know.

Q. MR. BOWEN then went on and said: If the birth certificate shows a birth outside of the United States, then we make a random – selected other inquiries to determine if they are legally in the district and in compliance with the law.

Have you ever done that process or have any of your employees ever done that process?

A. Not to my knowledge.

Q. Not to your knowledge?

A. Yes.

Q. At the time that Mr. Bowen, that this deposition was taken, which was January, 1979, was he your immediate supervisor?

A. Yes, I believe so.

Q. He was? Is that correct?

A. I was trying to think when he became Commissioner. That would be basically correct, yes.

Q. I refer to page fourteen of his deposition when I asked him for more details and he refers me to – the Audit Division and the Director, Ed Randall, who is you, indicating that you were directly responsible to him.

Is that a correct statement?

A. That would be correct, yes.

Q. He is now County Commissioner, is that correct?

A. Yes.

THE COURT: Just a moment, please.

(Conference in another matter.)

Q. (By Mr. Schey) Looking again at page thirteen of the Bowen deposition, I asked him: Is there any standard criteria with regards to what initial survey of the birth certificate would uncover which would trigger a second step in the auditing, namely, some type of random inquiry?

And he said, well, I think as I stated originally, dependent upon the size of the district and we would determine, number one, the area being audited, how many birth certificates were available for students who were born outside of the United States.

Do you agree with that? Do you think that's what happened?

A. If that were the charge for audit, I would say that would be correct, yes.

Q. Have you ever seen that approach being taken the past five years?

A. No.

Q. Looking at page fourteen of that same deposition, he then said: The next step of the audit would be that they – meaning your employees – the auditors would ask to see the documentation on the student that they were looking at.

Is that correct?

A. That would be basically correct, yes.

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A. We would question the attendance of that child.

Q. Could you just explain what you mean by question –

Let's say there is no doubt about it. A child walks in and says, that's right, I am currently the subject of deportation proceedings.

Would that child be – under the instructions that your auditors have, would that child be eligible or ineligible for state funds?

A. We would question him as being ineligible and we would determine his attendance for that year so as to subtract it out.

Q. He would be ineligible?

A. He would be ineligible.

Q. Okay. What if the child said, well, I have already lost my deportation hearing, but it's on appeal.

Would that child also be ineligible?

A. We would – everything I am saying here is speculation – I don't know. I would have to see the exact situation.

Q. Do you think your auditors know?

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Q. Now, are you aware that prior to 1975 certain Independent School Districts in fact excluded children who were undocumented from the public schools?

A. I understand that to be true.

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A. That's what I understand, yes.

Q. That Mr. Bowen seems to confirm that on page thirty-eight of his deposition.

I asked Mr. Bowen this question, page forty.

I would like to see if his response is correct.

I said, to your knowledge, has your department gathered or made any attempts to gather from the school districts in this state a compilation of their policies in implementing Section 2103-1?

Now, to the best of your knowledge, does that remain true today?

A. To the best of my knowledge, that's correct.

Q. Don't you think that it would help your auditors if you did compile all of the policies that the Independent School Districts followed?

A. Not particularly, we have to look at them mostly. They are subject to change.

Q. I would like to ask you on page forty-ive, I would like to see if you agree with Mr. Bowen on this.

The question was: Clearly the documentation in and of itself is not what you are concerned with.

Is it fair to say that what you are really concerned with is the immigration status of the person in possession?

His response was: Does the documentation indicate that he is legally in the country. That's what I mean.

Is his interpretation accurate?

A. I would say yes.

Q. And do you believe your auditors are aware of that interpretation?

A. Yes.

Q. A person has to be legally in the country.

Is that a yes?

A. Yes.

Q. A person has to be legally in the country.

Is that a yes?

A. Yes.

Q. And his next statement, which is on page forty-five, forty-six, he said: If the person upon the time the action is initiated to examine documents – I assume he is talking about audit – is legally in this country, he is admissible and the foundation program aid will follow.

Is that a correct statement?

A. Yes, I would say so.

Q. Mr. Bowen also responded as follows to this question.

I would like you to tell me if this is your understanding of the current policy. The question was: If a

student approaches a school and was not in possession of INS documentation and indicated that he or she was in the process of contesting his or her deportability, current statewide policy would allow the school to deny admittance to that child on a tuition free basis.

Is that correct?

And he responded, yes.

Do you believe his statement to be accurate?

A. I would say, I would hesitate to say inaccurate.

Q. My question –

A. As –

Q. My question was is his response accurate?

A. Repeat that again.

Q. I asked him: If a student approached a school, was not in possession of INS documentation and indicated that he or she was in the process of contesting his or her deportability, current

March 3, 1980 (morning)
VOLUME XIV

TESTIMONEY OF DAVID BUENTELLO

[page 361]

Q. (By Mr. Mealer) Would you state your full name for the court?

A. David Buentello.

Q. Mr. Buentello, with whom are you employed?

A. The U.S. Department of Commerce, U.S. Bureau of Census.

Q. What position do you hold there?

A. I am the Coordinator for the Community Services Program for the Dallas Region.

[page 383]

Q. How is the Census going to count those persons that by their very nature are going to be very difficult to count?

Let me ask you a specific question regarding migrant farm workers, migrant workers in the field.

A. This is a segment of our population that has been very, very difficult to enumerate.

The reasons being that these people tend to leave their state or the Rio Grande Valley where I believe we have our largest concentration of migrant farm workers, they tend to leave our state before April 1, 1980.

Now, we in the Bureau have procedures to enumerate them once they are out of the state, provided they live in labor camps. However, we know that only a very small percentage of these people live in labor camps. Most of them end up living in regular residential houses.

So, our concern is that if these people, and if they live in residential housing, they will get a questionnaire at their home. If they fail to read the instructions and those instructions are down here on the

bottom. It says that if everyone here who is staying only temporarily and has a usual home elsewhere, please mark this box.

And then it says, answer the questions on pages two through five only and enter the address of your usual home on page twenty.

By this, we – they have to fill our their permanent address in the last page of the questionnaire. If they fail to do this, that means that those people will be counted as residents of the State of Wisconsin, Indiana, wherever the case might be.

When that happens, that means that Texas, the State of Texas ends up losing millions of dollars because these people have their permanent residency in Texas, yet when the funds are allocated, those moneys will go to those states in which they were counted as of April 1, 1980.

What we are trying to do, and we are in the middle of a campaign right now in South Texas, is informing the social service agencies, the media, church groups, civil rights organizations to please help us in the awareness process so that our migrants, should they leave before April 1st, they will know how to fill out their census questionnaires, and it should be noted that these people from South Texas come from the lowest income area in the United States. They are the poorest in the nation. And they have the lowest educational attainment and if we don't do this, this is going to hurt them.

We are going to live with the ramifications of that count for the next ten years.

March 3, 1980 (afternoon)
VOLUME XV

[page 1003]

THE COURT: What is your full name, please sir?

THE WITNESS: William Noah Kirby.

THE COURT: All right. Mr. Mealer, you may proceed.

EXAMINATION

By Mr. Mealer

Q. Mr. Kirby, where are you employed?

A. At the Texas Education Agency.
Q. And what capacity are you employed?

A. I'm Executive Assistant to the Commissioner of Education.

[page 1008]

commitment to public education to elementary and secondary education?

A. Yes, it's a major educational program. It's in excess of three billion dollars at this time.

Q. Just for one year?

A. For one year.

Q. Now, you have been with Title I since its inception in 1965; or when I say you have been with it, you have had some association with it. Isn't it true that the

original Title I has now been – well, there have been added additional programs aside from what was originally the poor Title I program for poor children?

A. Yes, sir, there have been.

Q. And what are those programs? Do you remember?

A. We have Title I Migrant.

Q. Let me interrupt you. What I tried to do on the blackboard there was draw the general Title I program, and then I just drew circles for some of the additional programs.

I wonder, could you just in order to assist me, because I need to keep track of them, could you fill in what some of these additional programs are?

MS. DASHER: Could I ask that these

[page 1013]

So, forty percent of the state or national average per pupil expenditure with these kinds of limitations, times the formula children go into that.

Q. Who are the formula children?

A. The formula children would be the children above the – well, the low income children, and the low income children would be defined by the Orshansky Index, the low income children as defined by the Orshansky Index, based on the latest census data; and so, we are currently using 1970 census figures.

Q. Let me interrupt you there. Do you know which state has more poor children according to the 1970 census than any other state in this country?

A. Texas.

Q. Thank you.

A. We had 636,776 low income children in Texas alone, which is the most in the nation. That's one factor.

The second factor is – well, the latest amendments modify the AFDC. You now count two-thirds of the children receiving AFDC payments above the Orshansky figure.

In other words, if the Orshansky Index for low income is $6500, you count those children

[page 1026]

Title I money. It's not forced on any school district, or for that matter on the State of Texas.

A. No. It's voluntary to request the funds.

Q. Thank you, Mr. Kirby. Just take a seat; and I think there in front of you you will notice an annual report of programs for the disadvantaged in Texas, 1977-1978, marked Plaintiff's Exhibit No. 19.

If you would, just turn to Page 4, and I think we have kind of a breakdown of some of the characteristics of the participants in the program. I guess we are talking about the children involved in the program.

A. Yes, I see it.

Q. And I notice that almost half of the children invovled in the Title I program are of Hispanic descent.

A. Well, we need to clarify one thing. This is not talking about just the Title I program. This is talking about

compensatory, which would include Title I as well as the State Compensatory Education Program.

But, of the children participating in those two programs combined, according to data,

[page 1028]

listed it as a national concern that the money was being all spent at the early levels.

But, consistently over the years it has been spent at that level because of USOE's insistence.

Q. Let me show you what is marked Defendant's Exhibit 6-2, and let me get some general idea of how much Title I money comes into the State of Texas.

Now, what has been the total allocation of Title I money, Title I general money, Title I A, looking at the poor kids, since the inception of the program?

A. Well, from 1965 until the current year, approximately 1.3 billion dollars have come to the State of Texas under Title I Regular.

Q. And I wonder if you could – I know you are going to have to make an estimate, looking at that figure, how much Title I money has come into this state since fiscal year '76, I guess the last five years.

A. Well, we had probably over half of that amount has come just since that time.

Q. Half a billion dollars?

A. Well, half a billion to more, to six hundred

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Q. Now, let's talk about some problems, or actually, let's talk about some general federal requirements that are tied to the use of this Title I money.

I don't know. I can think of one that seems to be most important. Is there one that comes to your mind?

A. Well, one of the most persistent kinds of problems, I guess, you are thinking of supplanting the whole concept that local districts must provide for all of its children a base level program; and then the Title I money must go on top of. If I may use the blackboard or the paper, rather than the blackboard, every school district is required to provide out of state and local funds a basic program for every child. The Title I funds must be supplementary; and by that, they must go on top of the basic program.

So, if we are spending, say, $1200 per child out of state and local money, the Title I money, if it is approximately $300 per child, would go on top of, and we would line up for the children with special needs that are in the Title I program, spending maybe $1500.

The problem is in defining the term supplementary. In other words, it becomes very difficult sometimes for school districts to see that they are spending all $1200 that they are required and then spending the Title I money on top of.

We have a concept that the Office of Education has put forward that in Texas we define as double-dosing. Essentially, what the feds have said is that if you are going to take a child that has problems in math, then

you must give him the state and local math first and then the Title I money will buy extra help in math.

[page 1033]

Q. I guess the general idea of the requirement, or the general requirement is that the whole Title I program is designed to supplement the education that the poverty child is receiving in the public schools.

A. That's right. It's in essence the concept that whatever you are going to give a child out of state and local, or whatever you are required to give a child out of state and local, must be given, and then the federal is extra.

For example, even if we receive a court order or something to do something special, that has to be done with state and local, and then the federal money would have to be on top of it.

[page 1047]

Q. Let's assume the district is educating undocumented aliens solely with local money. You wouldn't have any problem there.

A. We wouldn't have any problem, like I say, because we probably wouldn't know that. We might be a little nervous. We have had some experiences recently with a case where we paid back $58,000 out of state money because we had a program in the Rio Grande Valley that was providing education to migrant children, and we had a situation where that at the time some of the classrooms were almost empty where we had very few migrant children in the classes. They hadn't come back yet. We let some other disadvantaged children, for a portion of the children, and took them out in the migrant children program. We called out in the migrant children program. We called that space available. It wasn't costing any more. We weren't depriving

migrant children. The teachers were hired, and we got a federal audit on that, and they said we were serving ineligible children.

So, we were required to pay back, even though it didn't cost anything extra, we were required to pay back $58,000.

We even pointed out to them that the state had notified the US Office of Education that we were going to serve these children, and they came back with, "We are not held responsible for the illegal acts of our federal employees. The fact that you have told us doesn't prevent us from getting this money back."

So, our worry in Title I would be the concept that are you in fact required to provide an education to these children, and if you are required to do it, are you supplanting, and whether or not you can use the monies, to take some federal employee's definition, yes, you can serve the illegals, or no, you can't serve them. Our fear would be, can we believe what they told us. If they said yes and some auditor later on questioned us, we couldn't use it, as a defense that you told us it was all right to serve them.

[page 1051]

Q. Let me ask you this: If you had a regional director of HEW that said it was all right to serve undocumented aliens, would that have –

A. If the secretary said it was all right, it wouldn't take away my worries because of the court case where they said no officer of the federal government has the authority to override the law; and consequently, will not be bound by the illegal acts of our employees.

The only thing that would take away my worry that we would have some future problem would be if the Congress would write in the statute, and that's what they said on the migrant case. "If we had intended for you to serve non-migrants on the space available, we would have written into the law that you could serve those kids."

So, I think the thing that would make me comfortable, if they had intended to use these monies to serve illegals, that they would have written into the law that you could serve illegals.

The other problem with this is we are only able to serve about four hundred thousand kids with Title I now. If in fact we being to serve any significant numbers of illegals, it would eliminate that like number of children that are already here that are already in the schools that have a right to expect Title I services. Every illegal that we would serve with Title I would put out a legal that had a right to those services.

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Q. Mr. Kirby, is there anything in the federal regulations presently which would preclude the utilization of Title I funds, for example, if this judge were to order the state to educate illegal aliens and use Title I funds or Title VI funds?

A. 45 CFR 116.40 has a specific prohibition in it that comes under the supplanting area that says anything that you are required to do by state law, or subject to a court order, then you may not utilize Title I funds to meet those requirements. Title I funds could be used to go beyond that level; but whatever you are required to do, either by state law or by court order, Title I funds cannot be used to accomplish that.

[page 1059]

Q. That looks to me like you are not serving approximately two hundred and seventy-six thousand persons.

A. Two hundred and thirty-six thousand. We are serving less than two-thirds of the students that we receive money on.

Q. And that's because there isn't enough money. Is that correct?

A. That's right.

[page 1071]

TESTIMCNY OF MR. FRANK CONTRERAS

A. It's primarily on the basic skills, in reading, math, the oral language development. There are some enrichment programs.

Q. Mr. Contreras, is Title I Migrant money, can it be used on anybody besides migrant children?

A. No.

Q. Approximately, if you know, how many school districts in this state participate in the Title I Migrant program?

A. Three hundred and twenty.

Q. Is that approximately a third of all the school districts?

A. Yes.

Q. What about the districts that I wouldn't think would have any migrants, the big urban districts, Houston, Dallas, San Antonio, Fort Worth? Do they have migrant programs in those schools?

A. Yes.

Q. Mr. Contreras, which state has more eligible migrants; and we will get into eligibility in a minute. Which state has more eligible Title I migrants than any other state in this country?

A. Texas.

Q. Which state in this country gets more Title I, any grant money than any other state?

A. Texas.

THE COURT: Let me ask the question I wanted to ask this last witness, and I forgot about it.

Mr. Contreras, how do you pronounce your name?

THE WITNESS: Contreras.

THE COURT: Do you know how much Texas spends of its own tax money to educate a child in Texas?

THE WITNESS: I understand that it's about a thousand dollars.

THE COURT: Do you know how that stands relative to the other states of the union?

THE WITNESS: No, I don't know.

THE COURT: So, you think that Texas spends at least a thousand dollars per child per year of its own tax money? I'm not talking about federal money.

THE WITNESS: That's correct. I know there is some states that have a per pupil expenditure that's greater than Texas; but I don't know how Texas

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state approximately right now to the best of your knowledge, one hundred and fifty thousand migrant children in this state between the ages of, you said, three to seventeen?

A. Twenty-one.

Q. Is a twenty year old migrant considered a migrant child?

A. Yes, if he is in school.

Q. And I guess it is true that a substantial number of these migrant children speak Spanish as their primary language?

A. Yes.

Q. Do you have any information on statistics on that?

A. No. I wouldn't know what percentage of those.

Q. Okay. Now, let's discuss for a moment who is considered an eligible migrant for Title I purposes.

If you would, Mr. Contreras, just read that. A child whose parent or guardian is a migratory agricultural worker and who has moved within the past twelve months from one school district to another, or in a

state that is comprised of a single school district, has moved from one school administrative area to another to enable the child's guardian and/or a member of the child's immediate family to obtain temporary seasonal employment in an agricultural or fishing activity.

To your knowledge, is that your definition of an eligible Title I current migratory child?

A. Yes.

Q. Would a child fitting into this criteria be eligible to receive federal funds?

A. Yes.

Q. Formerly migratory child is a child who was eligible to be counted and served as a current migratory child, the person we just discussed, within the past five years who had been a currently migratory child within the five year period, but is not now currently a migratory child, who lives in an area served by a current migratory child education program, and has the concurrence of his or her parent or guardian to be continued to be considered a migratory child, would this child be eligible to receive Title I Migratory federal funds?

A. Yes.

Q. Isn't it true that the State of Texas receives migrant money not based on any census formula, but on the number of migrants and formerly migratory children that are identified in the State of Texas and recruited or reported to the migrant student records transfer system?

A. It's based on the FTE, generated by the number of students that fall under those categories.

Q. We will talk about the FTE; but generally, even with the FTE, the bottom line is we get more migrant money because we found more migrants in this state. Is that correct?

A. That's correct.

Q. Now, just generally, FTE stands for what?

A. Full Time Equivalency.

Q. Before we get into that, could you explain for the record what the migrant student records transfer system is?

A. It's a computer data bank where once we have determined that the child is an eligible migrant, then he is, with proper documentation, is taken care of. Then, that child is entered into a computer, which is a national system. Then, on a given calendar year, the count is taken, and the number of FTE that is generated by the number –

THE COURT: Let me ask a question

[page 1084]

FUTHER EXAMINATION

By Mr. Mealer

Q. Getting back to the Migrant Student Records Transfer Act, Mr. Contreras, I think we talked about one of the purposes of this system is to identify where migrant children are, isn't it?

A. That's right.

Q. And I guess another would be to kind of supplement their education to kind of keep track of children moving all around the country; and do you report anything about their education, their educational progress to the system?

A. The migrant records, student records, has two purposes, number one, to have a count of the number of students that have been identified. Secondly, as a vehicle of transmitting academic and health information concerning those children. For example, children that are in the migrant project here in Houston moving to Sacramento, California, their records go via this system. Therefore, the receiving teacher knows what that child was doing at the time that he left Texas. If he received immunizations here, they are not repeated at the receiving state or receiving school district.

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Q. Let me go back to that criteria. Now, reading the criteria of a currently migrantory child, and certainly reading the criteria of a formerly migrant child, who was a migrant four or five years ago, it doesn't seem to me to require that a migrant child to be identified has to be enrolled in a school. Is that not correct?

A. That's correct.

Q. In other words, and I want to be sure about this, a migrant child identified in this state for purposes of federal funds doesn't have to be in school just so long as he fits the federal criteria of a currently migratory child or formerly migratory child?

A. That's correct.

Q. Mr. Contreras, if you would open up the little folder that sits right before you, I think you will see a letter marked Plaintiff's Exhibit No. 220.

A. Yes.

Q. Could you take just a few minutes and look at that letter, see if you can recognize it. Is that your signature on the second page?

A. It is.

Q. Do you remember the reason you wrote this letter?

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regulation as prohibiting a recruiter, somebody out to identify migrant children, you interpret this regulation as prohibiting them from asking their documentation status?

A. That's correct.

Q. And so, when these people are out identifying migrant children, they do not ask whether they are American citizens, whether they are aliens, or whether they are illegal aliens?

A. That's correct.

Q. And you feel the federal rgulations prohibit you from asking that?

A. That's right.

Q. And this regulation went into effect in November of '78, did it not?

A. That's correct.

Q. If you would, Mr. Contreras, there is another letter in there, but this letter is marked, I think, Plaintiff's Exhibit No. 221. Let me find my copy.

It's a letter dated September the 7th, 1977, which is a year before this regulation that we talked about went into effect, the regulation that says you can't look at the documentation status of these migrant children.

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federal funds coming into this state from migrant education?

A. For that particular year.

Q. Mr. Contreras, isn't it true that almost half of the migrant funds in this state are allocated in one of the twenty educational service centers in this state?

A. That's correct.

Q. And that's Service Center No. 1, isn't it, sir?

A. Yes.

Q. Where is that?

A. Edinburg, Texas.

Q. Where does it cover?

A. It covers the Rio Grande Valley, thirty-four counties, I believe.

Q. Upon the Mexican border?

A. Yes.

Q. And that's where most of the migrant children have been identified, I would assume?

A. Right.

Q. Do you remember in our deposition when I asked you some of the common problems that the migrant programs have in not complying with federal guidelines, do you remember what the first problem that came into your mind was

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JOINT APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

* * *

NO. 80-1538

* * *

JAMES PLYLER, Et Al.
V.
J. AND R. DOE, Et Al.

* * *

NO. 80-1934

* * *

STATE OF TEXAS, Et Al.
V.
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et.al.

VOLUME D

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TESTIMONY OF MR. ALTON BOWEN

DIRECT EXAMINATION

[page 1271]

Q. (By Mr. Schey) Mr. Bowen, thank you for coming here from Austin. My name is Peter Schey and I think we met at your deposition a few months back.

Could you please state your current position with the Texas Educational Agency?

A. I am Commissioner of Education

[page 1324]

Q. Well, if it was so clear, why was it necessary to issue guidelines a month ago?

A. We issue guidelines and make policy decisions on all laws that are passed by the Legislature. Sometimes we only track the law, but the schools were calling us repeatedly about what would a child have to have in order to be considered a legal alien. We gave them the best information that I.N.S. gave us. Subsequently as a result of continuing calls we updated the list. I gave them in '75 all that I.N.S. gave us.

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TESTIMONY OF MR. RAUL BESTEIRO

Q. (By Ms. Dasher) Mr. Besteiro, I was trained in French

and so I have a little trouble with the "R"; could you say your name again for me?

A. Besteiro.

Q. I don't think I am going to make it.

What is your present occupation?

A. I am Superintendent of Schools in the Brownsville Independent School District.

Q. How long have you been involved in that particular occupation?

A. As Superintendent I have been there over three years. I started on December 1st three years ago. So I am on my fourth year.

I have been with the District 22 years, starting as a biology teacher and moving through the ranks to assistant principal, principal, deputy superinendent and now superintendent.

Q. What has been over the years your connection? What are your roots as far as Brownsville goes?

A. I was born and raised in Brownsville. I have lived in Brownsville all my life. I left Brownsville only for the period of time to attend the University of Texas, to get my teacher's degree and then to get my master's degree and I returned to Brownsville and started work as a member of the Brownsville Independent School District 22 years ago which is exactly half of my life.

Q. Why are you working for the Brownsville School District?

A. Well, I love education and I love to work with children and I enjoy the work I do. So that's why I am working for the Brownsville Independent School District.

Q. Is your family from Brownsville?

A. My family is from Brownsville. My great-grandfather is one of the originators of the old, old community there. That's where our roots are.

Q. Have you been active at all in Brownsville city affairs? Has your family been involved in that kind of thing?

A. Yes. We go back a long way.

I have been active in all walks of public affairs in Brownsville as far as service organizations, as far as working with different organizations in the community, Community Fund, Red Cross, Boy Scouts.

I am the head of the Salvation Army unit at the present time. I belong to the Kiwanis Club. I have been very active in Kiwanis; Independent Governor for our division. I follow a long line of uncles and aunts that are active in the community. All of my uncles on my mother's side of the family have always been very active as far as community affairs are concerned.

One of my uncles is Judge Reynaldo Garza. Another was head of the Navigation District for close to 20 years.

So the family has been real active in community affairs.

Q. Is Brownsville near a Mexican border community?

A. Yes. Brownsville borders right on the Rio Grande River, with Matamoras, Mexico across the river. The only thing between them is the body of water between the two towns.

Q. Are they considered as sister cities?

A. Yes, we are. We are connected by two international bridges and people come back and forth all day long. Just like one main street.

Q. Has that particular proximity caused you any problems as the Superintendent of the Brownsville Independent School District?

A. Up to this point the only problem it does cause is that it enables people to have real easy access into the part of downtown Brownsville and into the community of Brownsville because, sitting right on the river, people are always trying to come across to work in Brownsville and to live in Brownsville.

MR. SCHEY: I am going to object on the ground that he is speculating as to why people come across.

THE COURT: Overruled.

Q. Have you, during the last few years, had occasion to testify in front of the United States Congress?

A. Yes. Not the Congress itself, but a Senate subcommittee in connection with a bill that Senator Bensen (sic) has introduced to try and help school districts like Brownsville with the impact that we have received from legal alien children that are in our schools and Senator Bensen (sic) at the present time has a bill pending which would enable schools like Brownsville to receive a thousand dollars a head for legal alien children to build buildings. That's the main purpose

of the bill. It has been introduced three times and we have been trying for three years to get it passed but as of yet we haven't gotten any money from it. This is to enable us to construct buildings to take care of the impact we are receiving from over 1200 children in this year already that have come there legally and are in our school.

Q. Are the bills I have handed you the bills you are referring to?

A. Yes.

MS. DASHER: I would ask that those be admitted, Your Honor.

THE COURT: They are admitted.

Q. MR. BESTEIRO, would you tell the Court a little bit about what is involved in being the Superintendent of a school district and what financial burdens you face, particularly in Brownsville? Limit your testimony only to your experience in Brownsville.

A. Yes, ma'am. Being Superintendent of the Brownsville schools involves doing a little bit of everything, and what I mean by that is that we have to be aware of the needs of the personnel that work in the district, the needs of the children that go to school in our district and how we go about pulling together to give our children and our community the best education possible.

We are not a wealthy district. In fact, in the State of Texas we are very low, but we are No. 18 in size and so we are a large district with very little wealth.

The number of children we have in our district compared to the community as a whole is enormous

because this year we have over 25,600 children and, so, our big enrollment which is a thousand more than in the previous year for the same date. In order to keep up with this type of growth, we have to do a lot of planning and do a lot of earmarking of money so that we can provide the facilities and the room to educate these children.

Together with this, we have a teaching staff that has to operate in schools that are old. In the elementary division of our school system, 50 per cent of the rooms are portable. Some of those rooms go back to World War II. We haven't been able to do away with the portable buildings because every room is being used and we have teachers who do a tremendous job, but they enjoy eating and living decently and we have to provide a decent wage for them so that they will continue to teach the children under the conditions we have to work in, which is portable buildings, no air conditioning, and so we have to take away from the building program and keep on using these portable rooms to meet the requirements of the school district.

Q. How many legal aliens or commuter aliens have you admitted just this year?

A. Through February we had admitted from Mexico a little bit over 1200. I am thinking it's 1262. I think it's somewhere around there through February.

[page 1367]

A. This is approximate. Our budget runs about $35 million. $6 million comes from local board taxation. $3 million roughly comes from Title I monies for migrant and for federal programs, and the rest is state money that comes in from the State of Texas.

Q. And that's what?

A. Roughly 25.5 million.

Q. 25 and a half million?

[page 1368]

Q. What is your situation as far as classroom buildings goes?

A. Well, we try to build buildings to accommodate the needs of the problem that we face is in not knowing the exact amount of children that are coming in on a given year. We try to anticipate on a five year past history of the school district and we try to build permanent buildings and at the same time we are always constructing portable buildings and within a period of 14 to 15 days we put a portable building and supply it for an overloaded classroom. I try to give my teachers a break by not going over 35 students. When it goes to 39 or 40 students, we build a classroom to break that up, hire another teacher, and give the students a better atmosphere.

Q. Are you at capacity at the moment?

A. Yes. We are above capacity. At Skinner Elementary School I had a report that I had 41 children in a room and we will be building a new portable building starting probably next week.

Q. Are you familiar at all with what the situation is with the Matamoras School?

A. By observation I am familiar, since I go to Matamoras quite often.

MR. SCHEY: I would object to that without an explanation of what the relevance is and also laying a foundation as the basis for his knowledge.

MS. DASHER: I believe I started to lay a foundation. I asked him, "Are you familiar with the Matamoras School?"

THE COURT: You may proceed.

Q. And you said you were by personal observation and by what else?

A. By the fact that I have relatives and friends that live in Matamoras and, since I am interested in education, I get a lot of information about their educational facilities there. They are trying to do the best job they know how. They are limited in their capacity to build buildings and they have one factor that we don't have and that is they can limit the number of students that come into their school, and that means that, once they are full, they say, "We have no more room." So there is a tremendous amount of children that are not going to school because of lack of space in the schools.

Q. Have you assisted them in any way with their needs?

A. Yes. We try to help them out as much as possible in the fact that they are always coming over to see if we have school desks that we have discarded that they could put to use or to try to buy some desks to better their facilities.

Q. We are sort of skipping around with you a little bit, Mr. Besteiro, but what is the feeling of your board and your community now with respect to bond issues?

A. Our community at the present time is totally against any kind of bond issue. Only about three years ago we had tremendous evidence in the community of the fact that there was a devaluation of the Mexican peso and, accordingly, more alients have been coming over from Mexico. Secondly, with inflation, people are al-

ways telling us, "Taxes are too high," and thirdly, the fact that people are very well aware of the number of children that are being allowed in from Mexico and a lot of the people are saying, "Why should we have bond issues to build schools for children from Mexico?"

[page 1372]

Q. About how many children, if you know, have you refused this year on the basis of that provision that they were not documented?

A. The count that my attendance officer gave me was over 313 families.

Q. That's just for this year?

A. Yes.

THE COURT: 1980?

Q. From September of '79 to the present, sir.

Q. Does the statute that we are talking about in this litigation, 2103-1, in its exclusion of undocumented children benefit Brownsville?

A. I am sorry. Would you repeat that?

Q. Does the exclusion of undocumented children benefit Brownsville in any way?

A. Yes. It enables us to have an educational component that we can cope with right now.

Q. What would Brownsville need to accommodate an influx of approximately another one to two thousand students?

A. An elementary school, and we are talking about an elementary school that would house approximately those students which would cost us a million and a half dollars. We are at the present time constructing one and this would take care of approximately 800 elementary children.

If we are talking about a secondary facility, it's a lot more expensive because in a secondary facility you have libraries and special services like music, athletics and so on. We would be talking about 2,000 children about probably four or five million dollars.

Q. So if money were available to you to build new buildings, you would be all right? Is that an accurate statement?

A. A. That's a very accurate point, yes. One of the biggest problems we have is trying to build buildings and what I am afraid of is that we are using up money for enrichment of our children's educaiton and we are putting it into buildings because you need to have a space to put the children in and I don't think it's fair in my district to be robbed of enrichment because of the tremendous influx we have of illegal aliens coming along that we can't keep up with.

Q. You said you had 400 families this year who had been refused admission into your schools. Do you mean 400 children or 400 families?

MR. SCHEY: I object. He said 313.

MS. DASHER: Well, whatever he said.

A. The figure that was given by my attendance officer was 313 and he is talking about adults that came in trying to place their children. 313 calls, in other words.

Q. What kind of enrichment problems do you feel have been diluted during this period of increased enrollment due to legal aliens?

A. Well, the fact that we have to really thin down on all our material. The fact that the equipment that we have has got to be limited so that every penny can go into the construction end of the school business. That is limiting the ability of our teachers for better materials to work with the children.

Q. What percentage of your buildings right now are temporary facilities?

A. At the elementary level, 50 per cent of my classrooms are portable, portable temporary facilities, if you call a portable building that lasts for years and years a temporary facility. Portable to us is permanent because we haven't been able to get rid of one. So really it is a permanent facility.

[page 1377]

Q. How do you account for Brownsville being in the position where you are having, I guess you said, 1200 legal Mexican children every year? What is your explanation for that?

A. Well, it's a very simple explanation. People are always trying to better themselves. You can't blame them. And no matter what anybody ever says, there isn't any better country than the United States of America and everybody is going to try and do what is best for their people, and when I say "for their people," I mean for their families, and I never blame people for coming over because it is a much better life for them and so, naturally, the first school they hit is the school district along the border and the towns that have some prosperity along the border, and Brownsville

being a growing community does have a certain amount of prosperity, and those people that are allowed in and have the right to come in, they come in to Brownsville.

Unfortunately, when they do come in to Brownsville, a lot of them don't bring any kind of capital wealth and it takes them a few years to establish a tax base which would be meaningful to the community of Brownsville.

Some of these people may go further up the country, but this is their first stop and sometimes, because of lack of funds, this is as far as they can go.

[page 1382]

Let me ask a question since you brought it up. Do you really think that, if the children in Mexico could go to school in Texas, that they would all come over here to go to school in Texas rather than in Mexico?

A. No. Not all of them. If you want my honest opinion, and this is what I would like to give you, the only concern we have is that we have a certain number that are already in Texas and in our district.

THE COURT: Whose mother and father are here?

A. Are here, but there are a number of children in Mexico, without trying to be an expert of any kind, that are not going to school in Mexico and what is to keep them from seeking an education over here? They have nothing over there. So what is to keep them from seeking an education over here?

THE COURT: Don't they have free public education in Mexico?

A. In a way, but they limit the space and, once they are full, they don't let them in school.

THE COURT: You mean they don't educate everybody in Mexico?

A. No.

THE COURT: Well, I will listen to everything you have to say.

A. As far as numbers are concerned, it would be hard to put a number on it and we hope that this wouldn't be the case. There is no way I can tell the court how many children would come over because I don't think anybody could do that.

THE COURT: Well, I just assume that the children whose parents are in Mexico would go to school in Mexico and what we are talking about in this case is children whose parents had come over to better themselves and whose children are over here.

A. Right, sir.

THE COURT: All right. You understand me and I understand you and I am just now hearing your testimony, but there are some children in Mexico whose parents are in Mexico that you feel would go to school over here if they could? Is that what you want to show, Ms. Dasher?

MS. DASHER: That was one of the impacts, Your Honor, yes.

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FURTHER TESTIMONY OF RAUL BESTEIRO

[page 2004]

Q. Mr. Besteiro, in your experience in life in Brownsville, have you had occasion to work with, talk with the illegal immigrant living in Brownsville?

A. On several occasions, yes, I have had the opportunity to talk with illegals living in Brownsville, definitely. I have observed areas where they live. I have talked to them in my office when they have come in – all the way to my office to ask for admittance for their children in our schools. And I feel – I have a compassion for them because I love to take care of the children, but I also have a duty to serve my district.

[page 2012]

Q. How many lawful immigrant children did you testify are currently in your district?

A. Lawful immigrant children.

Q. Children who are legally in the United States.

THE COURT: Do you mean in the district as residents or in the school?

MR. SCHEY: In the school.

A. I think that our figures were in the amount of close to 6,000 children in the schools, but I would like to say that there may have been some that have migrated up the country. We do not have the staff to keep on

checking every child on a yearly basis to see what their status is. I wish we did.

Q. Did you testify yesterday that there were approximately 5,946 that had entered the schools?

A. Yes. Since we started looking at the amount of legal children impact to our district, yes, sir. And that did not include the children that we have brought in this year.

Q. Now you are explaining that to count the number of children coming in, you have not had the time to count the number of children leaving, is that correct? Is that what you said?

A. I just said I don't know how many have left, and I don't want to lead the Court into thinking there are 5,963 children at the present time in the district.

Q. That 5,900 figure, beginning in what year?

A. '72, '73, if I'm not mistaken.

[page 2014]

Q. Would it be fair to state at this point that we really don't know how many lawful alien children are still going to your schools since you don't know how many have graduated, you don't know how many have migrated out -- it would be fair to say that you don't know a figure of how many legal aliens are going to school?

A. It wouldn't be because we figure less than 10 percent have left just on, you know, our observations from principals as to the number of children.

[page 2015]

Q. Now, did you testify in your deposition that you have a tremendous influx of legal alien children, but that quote, "We are not fighting that at all." Do you recall making that statement?

A. We are not fighting that. These children are as legal as you and I are. They have the right to come in. The only thing that I'm fighting is if the federal government allows them into the country, let the federal government pay for the buildings, at least, to house these children, and not our local taxpayers.

Q. That's really a dispute between you and the federal government concerning lawful immigrant children, is it not?

A. That's correct. And the point I'm trying to make to the federal government is that we are impacted just like an Air Force base or installation would impact a community by the number of children they allow to come into the country and hit a school district such as ours. We do not get any impact money for these children whereas if the federal government goes in and puts an installation somewhere, or if they bring in children from Vietnam or the children that came into Dade County in Cuba, everybody has received money to be able to cope with the education of these children. Yet, the children impacted along the border with children that are allowed by the federal government to come in have not received any money. Yet, everybody expects us to keep the best standards for our children without having to finance to do anything with it.

[page 2019]

A. Yes, but at the same time that I'm losing the money from the State, because of average daily attendance I

would not need facilities that I have to be putting a lot of money into and facilities that I have to maintain.

Q. You're saying that even though for every one dollar you put in you get $5 from the State, and you get two or three dollars from the federal government – you're still saying that you would be better off eliminating the State money and federal money that you get for those children just to save the one dollar you're putting in?

MS. DASHER: I just ask that Mr. Schey correct his figures. The federal government's involvement is $3 million. The local is six, so it would be 50 cents from the federal government.

A. The point I would like to make is that a district like ours and the community as the one we have is at the point that they will not vote a bond issue because they don't feel it's fair to be building buildings for children that the federal government is allowing to come in. If we had a normal situation like any normal district of our size that

[page 2026]

A. Yes, and it takes a little bit more time to build permanents because they last a lot longer.

Q. In terms of your buildings, let's stay with that for a moment because I think it is your testimony that that is your major problem, is tht correct?

A. That's correct.

Q. Do you recall stating in your deposition or, excuse me, in your Dallas testimony, Page 749, I quote, "I'm telling my board that we need five years just to build

buildings to catch up with where we should be"? Does that remain true today?

A. That remains true today, that is correct.

Q. Can you attribute any of that problem to the existence of undocumented aliens in the United States today?

A. I'm not talking about undocumented, I'm just talking about my present condition is five years right now with what I have.

Q. To what extent do you believe your present condition is a result of the structure of the funding of education in the State of Texas as chosen by the Texas Legislature?

A. Well, the State of Texas does not provide funds for permanent construction, and therefore, the local effort has got to be done to do permanent construction.

Q. Do you feel that that's the fault of undocumented children, or is that the fault of the Texas Legislature?

A. I wouldn't want to answer that because I don't think it's either's fault.

Q. Whose fault do you think it is?

A. The people of the State of Texas that vote the legislative people that set the laws, and if that's what they want to do, that's fine.

Q. Have you also testified frequently that 50 percent of your elementary schools are presently portable buildings?

A. That is correct, yes.

Q. Does that remain true today?

A. That is true today and that's – with that point in mind, when I tell my board what it would take to upgrade our district, that is one of the points that I'm making, because some of our portable buildings that we have are quite old. They're from World War I in some cases and from World War II in others, from the Air Force base that there used to be at Kingsville. They're in very poor condition.

Q. What is – given the construction base problems that you have, what is the present student-teacher ratio in –

A. In the district right now the present student-teacher ratio overall is about 30 to one in our district.

Q. What is required by the State of Texas?

A. The State of Texas requires 18 to one and 19 to one in the lower level grades.

THE COURT: Just a moment. Does that mean the state law is that the local school district must have at least 18 children per teacher?

THE WITNESS: No, that that should be the maximum a teacher should be working with in the kindergarten, first, second, third, and we are working with 30.

THE COURT: Just a moment. In kindergarten, elementary?

THE WITNESS: Kindergarten through the third, elementary, yes, sir.

THE COURT: All right. Thank you. Go ahead, please.

Q. Did you testify in the Dallas case that despite

[page 2039]

A. A little bit, yes. That's equalization.

Q. Can you tell us what equalization has done for you?

A. It has given us an additional amount of money, but not enough to be equal to the rest of the state. I think it's been unfair to districts like mine not to receive enough money to make – have an equal education as everybody else in the State of Texas. We can't really go out and say we don't want what they give us because we're so desperate that we need to take it, but we still don't have an equal education for our children as other parts of the state.

Q. Do you recall stating in your deposition, I quote, Page 36, Lines 14 through 17, "If you go back to equalization, which was going to solve all of the ills of districts like mine, we're more unequal today than we've ever been"? Do you recall making that statement?

A. Yes, sure.

Q. Do you think the reason for your making that statement is the presence of undocumented people in the State of Texas, or do you think it's the way the people of the State of Texas have chosen to structure their school financing in the state?

A. It has nothing to do with undocumented children. Equalization is how the structure on funding schools is.

Q. Who made that decision?

A. That is up to the legislative body. It's not up to us.

Q. Did you also state in your deposition on Page 36, 37, that, "If the State would come up with a good formula to take care of all the districts alike, it would be beautiful"?

A. Certainly.

Q. Talking about the impact of immigrant children, documented or undocumented, do you recall making the statement in your deposition on Page 52, "There are districts that are next to me that are terribly wealthy that could take on the whole world and not be hurt"?

A. That is – yes, I recall making the statement – because of the fact that I feel so bad for our children in our district that we have to spread out such a thing slice of bread where a district eight miles or twenty miles away from me has got no problem whatsoever and holds all the wealth that should rightfully belong to the Brownsville School District because of – I'd like to explain this.

[page 2045]

Q. But these are the same people who you're saying Brownsville will not pass a bond issue because they don't want to pay to educate the children of these legal immigrants? Isn't that what you've testified to?

A. That's right, because they bring no taxable wealth. I've also said it takes them four or five years to establish a tax base.

Q. The people of Brownsville don't want to improve the schools because these are Mexican children?

A. No. You said that, and I don't think the people of Brownsville will appreciate that because we are human beings. I don't appreciate it myself because I

don't think it's fair to our community to have something like that said. I hope somebody quotes you. They all know exactly the attitude of what you think of the people of Brownsville because I'm from Brownsville and I don't appreciate that one bit. Our people are working hard to maintain our schools. I would like to tell you this, in fact, because we pay a two-dollar rate on 65 percent value, and nobody in the Rio Grande area has a $2 rate -- and I resent that, Your Honor.

Q. Let's discuss what you said on Page 36, lines 5 through 8, quote, "Our people are not about to vote a bond issue because of the fact that they feel that they're voting bonds to house children that are coming from Mexico." What did you mean by that statement?

A. Exactly what the statement says. If a person comes in today and a thousand people walk in today and I need a million and a half dollar school, I'm not about to get them to vote them in.

Q. Why is that, just because they're from Mexico?

A. They don't think they should have to vote a bond issue. They're paying enough taxes as they are.

Q. Didn't you tell us that part of the good laborers doing the construction for you --

A. They're not doing it for me. You've got that completely wrong. I don't do construction.

Q. Who are they doing that for?

A. For people in the community. You better get you facts straight.

Q. Who are the people that they're building for?

A. People that are building different buildings. All I said is that we are getting people and they are trying to better themselves. I did make a statement a little while ago that the people that come in – within a few years you can see the improvement in their neighborhoods.

Q. Is there any other reason they won't vote a bond issue other than the reason that these children are lawful alien children from Mexico?

A. There may be a lot of reasons, but this is one of the main reasons where the community says, "Why should we put on another burden and up the – increase the value of our property and increase the values, you know – or increase the tax? We can't go over the $2 rate." The only thing we have left is to go from 65 percent of value to a hundred percent of value. This would, I feel, cause a tremendous burden on a lot of the people because our community is not a rich community. A lot of our people that live in that community that own small pieces of property – it would be a burden to them to have to pay that kind of taxation.

Q. What you're telling us is that it would be politically unwise for you at this time to propose the issuance of a new bond, is that what you're saying?

A. Definitely.

Q. Is that why you haven't proposed a new bond?

A. That is correct. The only way that I can propose a bond to my community is by working the way we have been working. I work the master plan.

Q. When was the last bond issue?

A. 1971.

Q. How much money?

A. I would say roughly about seven or eight million dollars.

Q. What did that go to?

A. That went into building two high schools and two elementary schools.

Q. When was that bond issue?

A. And additions to existing elementary schools.

Q. Prior to that time – when was the bond issue prior to 1971?

A. Probably in 1965 or '64. I don't want to be pinpointed.

Q. Were there also bond issues in the 1950s?

A. Some bond issues in the '50s were defeated. We had one in '45. We had some, maybe '54 or somewhere around in there.

[page 2050]

Q. You think the people they rent homes from are paying property taxes?

A. Sure they are.

Q. Do you–

A. Let me finish my statement. When you're talking about a home, you're giving this Court the impression

of -- to me a home is a nice -- at least a one-bedroom or two-bedroom --

Q. I think this Court is smarter than that, sir.

A. I'm not talking about -- they live in a square as big as where the judge is sitting. They are paying 10 or 12 dollars a month to live there, and that doesn't bring too much tax to the district.

Q. How many people do you know that are paying $10 a month rent, sir?

A. I could probably point out at least 20 within a five-block area of where my district office is.

Q. Is that the worst area in town?

A. Oh, no.

Q. There is a worse area?

A. Yes.

[page 2053]

Q. I'm not interested in teachers, so we don't have to spend time with that.

Did you testify also that there's approximately 87 percent Mexican-American students in your school district?

A. Approximately, yes, give or take a few.

Q. Let's just touch on the question of bilingual teachers for a moment.

A. Okay.

Q. When you were asked the question on Page 19, Line 22: "Is there a shortage of bilingual teachers," a shortage of bilingual teachers, you said, quote, "Not really," is that correct?

A. Not for our district, no, sir.

Qoncerning the problem with enrolling undocumented children for a moment, you said on Page 20, Lines 9 through 12, and I quote,"If I had enough buildings and if my teachers are getting the fair pay, I wouldn't have any problems." Does that essentially remain true today?

[page 2060]

You mentioned yesterday that -- I believe you mentioned yesterday that the problem you had, in exchange with the judge, that there's a real problem with commuters coming from -- children who, I guess their parents live in Mexico, but the children enter the United States to go to school, is that correct? You were explaining to the judge.

A. What I was trying to put together was that the close proximity of Matamoros to Brownsville and the relationship of families on both sides of the river puts us in a very unique position about the fact that there's a lot of families that would want to send their children to live with relatives and establish residence with a relative and go to our schools because we can furnish a better educational component, and they can learn English and things that they're interested in.

Q. Let me ask you this: Isn't that really a problem of how effectively you're able to implement the residency requirements? Isn't that really the question there, it's a question of residence?

A. We would spend all our time going to court to try to prove that they were there for the sole purpose of education.

[page 2066]

A. I don't think this. I ask and my attendance officers ask, you know, for any kind of document that would enable us to allow them to come into school.

Q. Let's say the person says, "I just have no document, Mr. Besterio, I wish I did; I've been down to the Immigration Service, and they tell me until I get a marriage certificate from the Yucatan that they're not going to give me anything to show."

Now, does that person have any rights to procedural due process?

A. No.

Q. Do you recall making this statement in your Dallas transcript at Page 755, Lines 11 through 20, "In my office alone, not in my attendance office," people coming to you, "when they come to my office, they really, you know, they're really going all the way"? I guess you mean they're going around the attendance officer and they have come to the superintendant.

"They're really going all the way, and I've got to be really obnoxious to them and tell them that I give them two minutes to get out or I'm going to call the border patrol because they come in demanding, and I don't think they have any right to demand anything because they shouldn't be in this country. That's the law of this country. They have no business here."

Do you recall making that statement?

A. Certainly.

Q. Is that a true statement?

A. Surely is. If I went to Mexico and I didn't have any papers, I'd be in jail.

Q. Do you also recall making the following statement at your deposition, Page 32, Line 13, in response to the question: Have you ever had occasion to personally interview undocumented families who attempt to enroll their children? Your response was, "Yes, Ma'am. There have been a few that come to my office demanding to go to school, and I have had occasion to ask them, you know, the reason that they're coming because they've gotten upset, my attendance officer has not allowed people in school."

The next question was: As a result of these interviews -- meaning with yourself -- do you have reason to believe that most undocumented alien children make their own decisions? You said, "My interview with them has been short and simple. I give them five munutes to leave my office or I will call the authorities because they're breaking the law, and I'm a firm believer in the law."

When you were asked what authorities you would call, you said, "I would call the Border Patrol, which is their responsibility to keep illegal aliens out of the country."

Were those true statements that you made at your deposition?

A. Sure.

Q. Is that what you call procedural due process?

A. Well, I don't see why I have to give anybody procedural due process that has no right.

Q. Okay. I have no further questions on that issue.

I'd like to go back to something you were testifying to yesterday which I think is significant in this case. I bleieve you testified that there were 313 persons who had applied to go to school between August 1979 or September 1979 and the present who you and your attendance officer believed were undocumented aliens, is that –

MS. DASHER: Mr. Schey, I object to the form of the question. The testimony was 313 families, not 313 children.

THE COURT: Correct that, Mr. Schey.

[page 2072]

what the real impact will be to the Brownsville School District"?

Did you make–

A. That's correct.

Q. Is that statement an accurate statement?

A. Yes, sir.

Q. Do you recall stating in your deposition at Page 54, Lines 5 through 6, that other than those 300 families who try to enroll, quote, "I could not tell you how many more are in and around the district," unquote?

A. That is also correct. I'd be lying to you – I don't know how many there are.

Q. Have you ever spoken with an undocumented alien family who indicated that their children were the ones

who had made the decision to come to the United States?

A. To answer your question just like you stated it, no, I have never spoken to one that indicated that their children made the decision because the Mexican people make decisions for their children, not children making decisions for themselves.

Q. Have you ever run into children who have come across without their parents in order to obtain an education and left their parents in Mexico, undocumented?

A. No, I have not.

Q. Do you recall making this statement, which I think is very important, in front of the Texas Civil Rights Commission, Page 113, Lines 1 through 4, and that is an exhibit in this case, quote, "Well, these people," and you're referring to the undocumented children, "Well, these people that we are rejecting are going to stay in this country, and if we don't educate them, we are really hurting them, but at the same time they're illegal. Something has got to be done." Do you recall making that statement?

A. Yes, I think I do.

Q. Do you still –

A. I really meant that because it's a statement that sort of hits me in two directions. The country has got to look at this seriously and has got to make a decision. We can no longer just say it's going to go away.

Q. Do you also recall making the statement along the same lines at your deposition, Page 42, concerning illiterate children, that they would be a burden on

society, "a real burden on society if we didn't make some attempt to educate them," unquote?

A. Well, I think my complete statement was – you only took a fraction of it – was that to be an educator and if nothing is going to be done about people being here illegally, and if they are going to continue to come in, in the future there will be a society of illiterate children, and I sure as heck don't want to be one to be blamed because we didn't have the foresight to do something. Then, on the other hand, I'm sitting with a district that doesn't have the funds to take care of the present needs.

Q. Or alternatively, who don't want to vote another bond issue because these children come from Mexico, is that right?

A. Well, not as such. It doesn't want to vote a bond issue because they are taxed to the hilt, and they feel it's not their responsibility for the people that are being allowed into this country.

You know – I don't know. I've got mixed emotions. I think I should be fighting the federal government and try real hard –

THE COURT: You're doing very well.

Q. I just have a couple more questions, sir, and I appreciate the time you're taking.

[page 2081]

Q. What you're saying is that you don't have the staff to engage in that kind of being tied up in court?

A. Right. It would be real hard to prove that somebody came over for the purpose of going to school. You'd

have to find out what their parents are doing. Now, if their parents are in Mexico, just to give you an example, and they are not hurting, they are well off, and they just sent that child to stay in the United States for no reason whatsoever, then, you know, you could build a case. But who is going to have the time to be doing this?

[page 2084]

THE COURT: Just for the record, you are a Mexican-American?

THE WITNESS: Yes, sir.

TESTIMONY OF ROBBY COLLINS

[2094]

Q. Mr. Collins, where are you currently employed?

A. Dallas Independent School District.

Q. What is your current job position with the District?

A. Deputy Associate Superintendent for Management.

[page 2096]

Q. Approximately how much of the Dallas funding is obtained from strictly local sources?

A. Well, I break the budget down into what we call state and local sources, which are basically operating money. We're currently operating with a $215 million budget of which about 42 percent of that is paid from state sources. The local ad valorem taxpayers finance the balance.

We also operate on about a $23 million federal budget, which are categorical targeted funds for the needs of special populations of our schools.

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Q. Could you switch federal funding currently received by Dallas Independent School District to aid in absorbing a sudden increase in students?

A. Absolutely not. That would result in a forfeiture of such funds.

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Q. How much are you spending on special education right now?

A. It varies from pupil to pupil. What the law requires is for us to provide an appropriate education for handicapped children aged three to 21. We have circumstances where we have some physically multi-handicapped children that we're paying upwards of 20 to 10,000 dollars a year to serve one child. We have others who are in the mostly disturbed and other type of historically standard special education classes that are about a four-to-one cost to the regular program. We're not sure, after we finish our child find program, ultimately what this law will mean to us. It's a very inadequately funded program that is putting a tremendous burden on the resources of most of the school districts. This is not just Dallas, this is statewide.

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Q. Is the Dallas District able to serve all students who qualify for bilingual education?

A. No sir. We are different than many of the other districts in the state in that by our desegregation order we offer bilingual offerings in K through 5, whereas the rest of the state has mandated the kindergarten through the third grade. We currently have in the neighborhood of in excess of 8,000 children that we have identified as limited ability English speaking students, but due to the lack of qualified bilingual teachers, we have some 25 or 2600 who are only getting English as a second language for purposes of instruction simply because the bilingual teachers are not available. Therefore, we're not entitled for the state aid since we do not offer a full program.

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ROBBY COLLINS,

the witness on the stand at the time of recess, resumed the stand and testified further upon his oath as follows:

CROSS EXAMINATION

By Mr. Schey

Q. Mr. Collins, could you tell us was there a declining enrollment in Dallas in 1977? I just recall from reading the press around September of 1979 – I remember while I was in town seeing about a 5,000-pupil decrease in enrollment. Do you know, was that sustained into the fall semester of 1979 or what was the decrease in enrollment for Dallas schools?

A. Our school district historically since 1970 has suffered an annual 3,000 to 5,000 annual student decline.

Q. Was that true in 1979 again?

A. Yes.

Q. What is the cost decrease to your total budget upon experiencing such a three to 5,000-pupil decrease or in other words, how much does it cost approximately or what is the total cost just to your local funds, not considering the state money that you get? What is the local cost of educating

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best five-week average of the six six weeks. They give you a little benefit of the doubt there because of seasonal enrollments.

Q. So it just means you are able to look at your highest enrollment basically and get reimbursement based on those?

A. This was primarily to help the rural and Valley districts in order to peak out their enrollments some time after the agricultural season ended.

Q. Just to clarify, if you were to anticipate or if you were to find out in the first week of May that as a result of a court order issued in this court you were going to have to enroll an additional 3,000 students you would then project that, add that to your ADA for 1980-'81 and seek those additional funds from the legislature, as I understand it? You would not have to actually have the bodies there in school before you began to seek reimbursement?

A. We would do two things: One, we would amend our average daily attendance projection for the ensuing school year with the Texas Education Agency.

Q. That would be for 1980-'81?

A. That's correct. The second thing we would have to do is to substantially amend our local budget in

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Q. Do you have any data as to how many of these children were excluded from Dallas Independent School District when 21.031 was enacted but who were going to school at the time of its enactment?

A. 21.031 upon its enactment did not alter the policies of the Dallas Independent School District. They had been in effect for some time.

Q. I see. What you are saying is Dallas was excluding undocumented children just based on its own internal policy prior to the implementation of 21.031?

A. Yes. Those attendance policies have been established over the last 20 years, particularly in light of desegregation litigation.

For instance, the question was raised as to why we never permitted tuition. Tuition payments to the Dallas Independent School District was part of the prime case brought in 1961 in the desegregation area.

Q. Now, do you recall when the Dallas Independent School District first began excluding children based on their alienage?

A. To the best of my knowledge for the last 20 years this has been consistent with our policy. I am not advised of the details of it.

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A. No.

Q. What is the student-teacher ratio in the K through three, kindergarten through third grade?

A. I believe with kindergarten 1 to 25; first grade, 1 to 24 or 1 to 22; third grade I believe is 1 to 24.

Q. Would you state those again?

A. I believe kindergarten is 1 to 25 with supportive teacher aide assistance. I believe first grade on the average is 1 to 22. Second grade is 1 to 24.

These are averages and in each school the principal has the latitude of plus or minus five students.

Q. How much would it take away from that educational process if your student-teacher ratio went up in many, many classrooms from 1 to 27 to 1 to 29 or 30? Would that really substantially -- do you feel it is better to not have it go up from 1 to 27 to 1 to 30 and to keep children out of school or do you feel it better to put some kids in school and have it go from 1 to 27 up to about 1 to 30 if that could be arranged?

A. The research on achievement does not bear out significant increases or decreases in student

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Q. You mentioned earlier that there are about 2500 students with a limited English deficiency who are not receiving bilingual training at the present time?

A. They are not receiving any full bilingual program because of the shortage of certified teachers. They are receiving ESL and any other assistance that we are able to provide within our limited language resources.

Q. Do you utilize teacher aides?

A. Yes, sir.

Q. ESL programs?

A. Yes, sir. Volunteers, any other efforts that we can use to try to get assistance to the children.

Q. Do you find generally that that is an acceptable approach, to use teacher aides and volunteers?

A. I discussed this last Thursday with three of our bilingual professionals and they all contend that while the services are the best we can provide that nothing is as effective as a full bilingual program.

For instance, ESL is one component of a full bilingual program and in addition an additional 25 dollars per child does not flow from the State unless you have a state licensed teacher through the certification program.

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Q. Have you had the opportunity to evaluate the impact on students of not going to school during any phase – I note that you have been in education for a good number of years now at various levels, as a teacher, as an administrator and now as a finance expert. Do you have any – based on all that experience do you have an ability to evaluate the impact of children not going to school whatsoever?

A. The entire system of public education is designed to give all children of all people an opportunity to participate in the mainstream. As a professional educator I have dedicated my life to trying to provide the resources and the institutions to do this. I can't sit here

and tell anyone that a child is better off not going to school. All children of all people of all nations are better off providing a full public education to make children literate and functioning citizens as a matter of philosophy.

I would have to hasten to add that I also work in the area of finance which means managing scarce finite resources in an area of totally unlimited need in terms of educational opportunity. Somewhere we have to make values as to where we place our priorities and place our decisions.

This has never been in my opinion an educationally centered lawsuit. It has simply been one dealing with the scarcity of resources in an educational environment totally with unlimited needs and someone has to operate within it.

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empty classrooms in Dallas right now?

A. I am probably aware there are a couple of hundred empty classrooms in Dallas right now. We have six elementary schools that have less than 87 children under the court order and they are getting smaller every year.

MR. SCHEY: No further questions, Your Honor.

MR. CAMPOS: I would like to ask a couple of questions.

CROSS EXAMINATION

By Mr. Campos

Q. First of all, for the record, Mr. Collins, you testified that there were approximately $3 million free fund balance at the end of this last fiscal year, is that basically correct?

A. Of available money to pour back into the building of the ensuing school year budget.

Q. Yes. Free fund balance. Now, I would like you to look in a yellow book that you have got in front of you to page four. Could you please state what the free fund balance indicated thereon is?

A. Projection is $9 million – six million for the '79-'80 school year.

Q. Six million what? Give the whole number.

A. $6,055,000.

Q. Okay. Right on that same page doesn't it give a sum for the year preceding?

A. Yes. Nine million.

Q. Can you give the whole number?

A. 9,400,000.

Q. I would like you to look in the blue book, please. I would like to call your attention to Page 2. Could you also indicate on the record what the free fund balance was at the end of the '77-'78 fiscal

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Q. Is it correct to say that to date the Texas Legislature has not changed its system of financing in education?

A. That's incorrect to say that.

Q. Is it correct to say that they have not changed it so that it is based on the needs of children?

A. I am assuming you are referring to the State as a school finance in the Rodriguez case. The State has made a significant number of improvements in terms of school finance equalization of property poor districts. In 1975 with the passage of House Bill 1126 they put in the first equalization aid to components which was about $75.

In 1977 they added another 132 million. In 1979 they added in excess of 100 million dollars. It amounts to significant relief of property poor districts.

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Q. You mentioned also the average cost per student of around 15 to $1700, is that correct?

A. Seventeen to eighteen hundred.

Q. Now, is that an accurate reflection of what it actually takes to educate a particular child?

A. No. That's an average cost. We have special education. For some kids it takes 10,000. You have in a lot of special programs a reduced class size. These are just averages.

Q. Does it cost more per child to educate low income students?

A. Yes. Historically with the testing we have done children from the low income homes generally need more compensatory aid in reading and math.

Q. Would the same be true of limited English speaking students?

A. Yes. It's generally true of low income families.

Q. To your knowledge has the decline in enrollment come from the least expensive to educate children?

A. Yes. It's generally true of low income families.

Q. To your knowledge has the decline in enrollment come from the least expensive to educate children?

A. Yes. The Anglo population has declined substantially. We were 70 percent Anglo in 1970 and we are currently approximately 30 percent Anglo.

Historically the Anglo middle class student has been less expensive in terms of the special programs required to provide equal opportunity.

Q. Has this decline in enrollment given the Dallas School District a lot of extra money to spend?

A. No. Our student clientele has become more expensive over the last decade in terms of achievement levels and the needs for the various programs as evidenced by our $23 million federal funds.

This has been an effort where local funds were not available to supplement the educational opportunities of children through Title I or Title VII or whatever.

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The second thing is large city schools throughout the United States have been given the challenge of educating the most expensive children with the greatest level of need. I can assure you that if you look at a

suburban school where the majority of children are reading at grade level or above the amount of resources dedicated to keeping that child in that reading level is not anywhere near a child who moves to Dallas or Houston from rural East Texas and is in the eighth grade and reading at a first grade level. The amount of funds that we have to have to bring that child up with the equal education opportunity is just phenomenal, five, six, $700 more per child just to give him an equal opportunity to a child that's reading on grade level. These have not been recognized.

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TESTIMONY OF MR. RAYMON BYNUM

Q. What is your full name?

A. Raymon L. Bynum, no D on Ramon and B-y-n-u-m.

THE COURT: What exhibit were you talking about?

MR. WILSON: Mr. Bynum's vitae, Defendant's 1-6.

MR. CAMPOS: I haven't received a copy of that vitae. I have no objections. I will get it later.

MR. WILSON: Plaintiffs have stipulated as to Mr. Bynum's expertise in the area of State school finance.

THE COURT: All right.

Q. (By Mr. Wilson) Mr. Bynum, are you familiar with State Education Code, Section 21031?

A. Yes, I am.

Q. That is not a microphone. So you are going to have to speak up.

A. Yes, I am.

Q. How does that statute permit the expenditure of State funds on undocumented aliens?

A. That statute speaks to a student being eligible for the benefit of Available School Funds. It works two ways. First, in Chapter 15 of the Education Code there is the requirement to generate Available School Funds that a pupil be in prior year average daily attendance. Therefore, a pupil must be eligible in the prior year, average daily year attendance the prior year to generate.

Over and above that, Section 2048 of the Education Code stipulates that the only use of Available School Funds is to pay the superintendent and teachers, interest on money borrowed to pay superintendents and teachers or to take the scholastic census which is no longer taken. Therefore, the first dollars paid to every teacher in the State of

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Q. Earlier in this trial Dr. Richard Hooker was using Plaintiff's Exhibit 279 and he estimated from that exhibit – I think that is 276. We will turn it in a second. He estimated that at the end of the current biennium the State will have approximately a $600,000 surplus in General Revenues which would be available to educate thse undocumented children if they were admitted into the schools. Do you agree with that statement and if not, why?

A. These State revenues include dedicated trust funds. The General Revenue Fund estimate here is eight thirty-one seventy-nine which was the estimate at the beginning of the biennium and was used to pay the cost – the biennium was included in the comptroller's account and these funds were used to include that.

The same thing is true of each one of these funds. The small amount of money in the Permanent School Fund would simply normally be an income that came on or about the 31st of August that could not be expended because of number date.

I would point out that in these State revenues as I recognize them as coming from the comptroller's report are cash balances and the State is not necessarily on cash in every case. These are cash balances and many cases there would be calls in early September, encumbrances against these and they would not be available for the next biennium.

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As far as an estimate for the six hundred million for the next biennium the comptroller who is Constitutionally required to do the estimating issued an estimate in January of some hundred and twenty-four million.

MR. CAMPOS: I would like to object and ask this court to strike this testimony inasmuch as it is hearsay concerning the estimates of the comptroller.

MR. WILSON: Your Honor, Mr. Bynum is an expert in the area of school finance –

THE COURT: Overruled.

A. He also at that time stated that even though he could not make an accurate estimate, that there might be as much as two hundred million more that would come out of funds that have been budgeted but not expended. The basic problem becomes --that's three hundred twenty-four million against nearly seven hundred million was the net result of all of these last year. So you can see that we are expending during this biennium more than the balances. In other words, other than for the balances, we are operating in a deficit biennium if we did not have balances forward.

Also in that area I am required to make estimates

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Q. Where does that leave that six hundred million surplus that Mr. Hooker was referring to?

A. Number one, I do not feel that we will have six hundred million. If we did, because we are in a deficit this year and because of the part forward, in my role in working with the legislature and furnishing these estimates, I am quite concerned as to whether we will have enough money to add the adequate inflation to the existing program without a tax bill.

THE COURT: Without a what?

THE WITNESS: Tax bill. Increase in State tax.

Q. (By Mr. Wilson) What is the significance of the various fund balances shown on Plaintiff's Exhibit 276 and 279?

A. The Foundation School Program of three million could simply be on August 31 a number receipt like the 30th or 31st. That would be insignificant. The

Available School Fund balance is a cash fund balanc. That was on 8-31-79.

On September 7 we had to draw against that balance $54,447,000 that was owed to school districts. So the actual balance after the September 7th payment was only a million eight hundred thousand in this fund.

So there did not really exist a significant balance. This shows that basically there is a priority on a fund called Foundation School Fund. It has a priority in drawing the treasury. That priority draw is only about seven hundred and twenty million. But this year, for '79-'80, the draw on what is called salary and operation, all the funds after the Available School Funds would be nearly a billion seven hundred million.

So from nine hundred million to a billion dollars of General Revenue will be necessary to pay for the cost of the public schools this year.

Q. Would you look at 279 and explain those fund balances as well?

A. The General Revenue Fund balance was six hundred and twenty million and it was set forth in the comptroller's estimate leading in and it was used to expend – and funds this particular biennium we started September 1, '79 running to August 31, '81. All of these balances were either at a dedicated trust fund balance or were used forward into our present budget.

Q. I don't know if I have ever asked you this and I want to make it clear to the judge. What is your position with the Texas Education Agency?

A. I am deputy commissioner for program administration finance. My duties include the control of State funds and Federal funds and the liaison to legislature and furnish them all their data in working in the area of school finance and school law.

MR. WILSON: You can be seated now. I have no further questions.

THE COURT: Did you start out as a classroom teacher?

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economy is derived primarily from consumer taxes? Would you agree with that statement?

A. "*Direct and indirect, nearly entirely.*"

Q. If you have a greater population, hence greater number of consumers, you would have more tax revenue? Would you agree with that statement?

A. You would have more but it does not show and the figure that I read did not show that those figures kept up with inflation.

Q. Isn't it a fact that the State of Texas has experienced population increases almost twice that of the United States for the last ten years?

A. I am not advised of that or expert on that.

Q. Well, I am taking this information from the Annual Report of the State of Texas. You have been qualified as an expert on State finance. Is your answer still that you are not advised?

A. I am not familiar with the growth in the rest of the states.

Q. Are you aware or are you familiar or advised in any of the economic indicators that go to show the health of the Texas economy at all?

A. I am aware of the movements within the funds and the growths that show the employment and such.

Q. How about economic indicators that show whether or not

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Q. Isn't it true that the majority of the taxes paid by consumers are actually what I term value-based taxes?

A. It's true, except in the State of Texas the sales tax exempts food, clothing and medicine and in times when people are in tight times, there is less sales tax paid because sales tax is on items that are not as necessary.

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If the plaintiffs win this case -- if we could just divide that into your total cost. That would equal $1,000.35. So the total net loss to each U.S. citizen going to school is $70. Is that really the bottom line we are talking about?

A. It would not be the bottom line. It would be the bottom line except that the state law would move the regular program which is about $800 a pupil and there is no way -- the State would have to draw $800 for a hundred and twenty thousand which would be 96 million a year or the State would have to come up

with a hundred and twenty-four million and be in a deficit unless the law was changed.

If the Court so orders that that will be the result to the State of Texas is a hundred and twenty-our will be exceeded by some 68 million dollars using the present law.

Q. I really don't understand what you are saying. What I tried to calculate is what would happen if you don't go back to legislature.

A. We don't have to go back to legislature to fund the regular program but it is a figure that if we add a hundred and twenty thousand it would put

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thousand. I just assume those a hundred twenty thousand students would not be prorated among all the districts? Some might get some of the students, some might not get any and some might get a large number and some might not get but a small amount.

In the way that the public schools are funded in Texas how would that affect them

THE WITNESS: Those schools that got the additional would get from the State for each additional pupil in ADA – no matter how they come in, Your Honor – if the Court so ordered them in they would get $800 per pupil from the State wherever they came. They would not get any of the categorical that had the terminology I used, some certain which means you cannot exceed a total amount set by the legislature. They would receive that and if the hundred and twenty thousand were

[page 2271]

THE COURT: Well, if I admit the students where would the money come from?

THE WITNESS: It would come from local property taxpayers because that's the only source that the school districts have. The large portion of it would come or the local districts would have a diluted educational program. This would be particularly true of where the large numbers come in.

[page 2277]

Q. Is it also true that the amounts of increase in the revenues from the permanent school fund jumped 13.6 percent from the fiscal year last year?

A. That's correct. At the same time the average educational cost in the State of Texas went up over 25 percent.

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[page 3023]

TESTIMONY OF CISSY SALINAS

EXAMINATION

By Mr. Florsheim

Q. Ms. Salinas, where are you currently employed?

A. At James Bonham Elementary.

Q. In the Dallas Independent School District?

A. Yes, sir.

Q. What is your job with the district?

A. Bilingual resource teacher.

[page 3025]

Q. How many different methods would you say that the district has used, since you have been there, in an attempt to institute an approach to bilingual education?

A. About five or six.

Q. Would you please list those and briefly describe for the court what they are.

A. Okay. We had a multi-age where we used several different grade levels together. We had K-2 where we had kindergarten, first grade children and second grade children in the same classroom. We went to K-2. We had Open Area, we had Team Teaching, we had ESL, and we had Pull-Out pgorams.

Q. How many of those did you actually participate in?

A. All of those.

Q. And which, in your estimation and experience, has been successful or unsuccessful?

A. Well, I guess the self-contained situation.

Q. Has been what? Successful?

A. Very successful.

Q. What about Team Teaching in a common area?

A. Team Teaching is difficult, because a lot of times you are dealing with teachers who have not been trained to teach in that type of situation, and there is a lot of problems there; and in Team Teaching, all the teachers are not certified to bilingually instruct.

Usually in a teaching situation of three teachers teaching together, maybe one of those teachers is certified bilingually, which means that teacher gets the bulk of the bilingual instruction, where the other two teachers basically teach in the normal situation.

So, you can see that the load is not being equally pulled, and there is a lot of problems.

There is a lot of teachers start putting up barriers, psychological and real barriers, and we get back into sort of a self-contained situation, which meant bo ebe open, and it sort of doesn't work too successfully.

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TESTIMONY OF EDWARD L. COWENS

Q. Mr. Cowens, where are you currently employed?

A. I'm employed with the Dallas Independent School District.

Q. And what is your current job position?

A. I am deputy associate superintendent, personnel services.

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Q. (By Mr. Florsheim) If I could just ask a more pointed question, I think I could reduce it.

Mr. Cowens, approximately how many persons do you use in your bilingual recruiting program as recruiters?

A. We use approximately – this year we will be using 17 people in our recruitment program.

Q. Do you advertise through various media, newspapers, publications of various kinds?

A. We do advertise in the media, the newspapers, the radio stations, and occasionally we get television coverage.

Q. Do you advertise throughout the nation?

A. Yes, we do.

Q. Do you visit campuses, education schools?

A. Yes, we do. We visit campuses, and we also set up shop in various cities in hotels in conjunction with our advertising and recruitment in that matter.

Q. Do you do this throughout the nation?

A. We do it in selected areas, areas of high concentration of bilingual persons.

Q. Let me ask you, do other states raid Texas for bilingual teachers?

A. Yes, sir, they do.

Q. Is California one of those states?

A. California is one of those states.

Q. Do they advertise in Dallas papers trying to get recruits out of Dallas?

A. Yes, sir, they do.

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Q. Do you have teachers who enter the bilingual context and leave frequently?

A. Yes, we do have.

Q. Do you happen to know why they choose not to remain in that particular field?

A. Well, some teachers who are bilingual find the matter of teaching in a bilingual setting somewhat to their dislike, because it does involve a bit of work.

Q. Is it more difficult?

A. It is more difficult.

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THE WITNESS: That's what I was talking about, Your Honor. I'm saying that there is a shortage of bilingual teachers that are employable for us.

Now, you have mentioned that you could go down on the border, what have you. We have gone down to the Rio Grande area, the Valley area, time and time again. We go almost three times a year. We have milked it dry.

Of course, there are Mexican-American teachers who are satisfied with their home environment. They don't want to move to an area that's unknown to them, where the way of life is somewhat different,

faster paced, into a community of strangers. They would much rather remain.

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Q. Now, in addition to Colorado, what states do you recruit in?

A. We recruit in 11 states, and we are, of course, increasing that number. Texas, Colorado, New Mexico, Arizona, Massachusetts, New Hampshire, Minnesota, Iowa, Arkansas, Louisiana, and so on and so on.

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Q. Just one last question. As a recruiter, would you recommend that Dalla hire poor teachers just to fill up a vacancy?

A. Dallas is committed to providing the best quality teacher available; and as far as employing poor teachers, I don't recommend the employment of poor teachers to fill a vacancy. It does the youngster more harm than good.

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[page 3132]

TESTIMONY OF COVEY T. OLIVER

COVEY T. OLIVER

was called as a witness, and after having first been duly sworn, testified upon his oath as follows:

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THE COURT: It's admitted.

MR. WILSON: I believe we have a stipulation from the Plaintiffs that Mr. Oliver is an expert in the field of international law.

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The Plaintiffs and the amicii imply that the President alone could and has by Mr. Carter's well-known general foreign policy support for foreign rights – human rights, excuse me, human rights – override a Texas allocation of State school funds. I overlook – leave some argumentative points out of here. I simply say that we have to think about whose money is involved in this case and make the homey point that if the Federals want these children educated, all they have to do is provide the tuition money.

[page 3232]

MR. LIGGETT: My statement is that undocumented aliens were counted in the 1970 Census and Title I funds are disbursed to states on the basis of that census.

A. I'm sorry, counsel. I can't help you on that. I don't know anything about that. All I know is just a simple old lawyer that the Federal Government hasn't so far as I can tell thrown its weight around fiscally with respect to this situation. And my personal view, if I may speak it is, as I said in the statement, is that the Federal Government should put its money where its mouth is with respect to this issue and pony up its share of the added costs that these children bear – that will impose upon all taxpayers in Texas. That's my personal view. You opened to that. It's not an expert view.

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TESTIMONY OF MR. ELPIDIO LIZCANO

Q. Mr. Lizcano, would you briefly, since the Court already has Your vita, give the Court the benefit of what your professional background is that's relevant to bilingual education and to your duties with the Houston Independent School District?

A. I've been an educator for about 21 years, and in that time –

THE COURT: Let me ask you this: Have you ever taught in public schools?

THE WITNESS: Yes, sir.

THE COURT: Where was that?

THE WITNESS: Laredo, Austin, Crystal City and here in Houston.

THE COURT: What grades did you teach, please, sir?

THE WITNESS: All grade levels.

THE COURT: Are you of Mexican-American descent?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

Q. You were Director of Bilingual Education in Crystal City?

A. That's correct.

Q. What is your present position with the Houston Independent School District?

A. Director of Recruitment, Personnel.

[page 3245]

Q. Where do you go to recruit your bilingual teachers, or where do you go to recruit your teachers?

A. All over the country.

[page 3246]

Q. What other effoirts do you utilize to increase your teacher corps in the bilingual area?

A. Well, this year we initiated – the District initiated the second mile plan, which includes stipends for bilingual teachers. They get an extra $500 for being a certified bilingual teacher with the Houston Independent School District.

[page 3247]

Q. Do you do any recruiting in the area in the high schools?

A. Well, the District has a high school program specifically for future bilingual teachers.

[page 3257]

Could you give me some idea of what impact you think it would have in the teacher recruitment area and in the needs of the Houston Independent School District if Houston were to get, for example, six to nine thousand limited English-speaking children suddenly or even over the next two or three years?

A. Obviously, we would even have a bigger shortage of bilingual teachers. There's not enough available at this point with what we're servicing right now. In fact, in the whole graduating class in the state, you know, almost is not enough to take care of the needs of what we would be needing here in Houston.

Q. If you doubled the number of children in the classroom and left a certified teacher in there and, say, an aide, do you think you'd be able to deliver a quality bilingual education?

A. That would not be the best type of approach at all. That would be hindering the students. That approch has been tried, to team teach and to put an aide, also, a bilingual aide with a monolingual teacher. You are cheating the kids.

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TESTIMONY OF MR. WILLIAM CHAMBERS

Q. Mr. Chambers, even though your resume is in evidence could you briefly outline your background with the Immigration Service and the number of years and what you do?

A. Yes. I have been in the Immigration Service for slightly less than 30 years. I started off in the Border Patrol, and progressed through as an immigration inspector, supervisory position. I was assistant district director for Travel Control hearings here in Houston. I transferred from here to Dallas as district director in Dallas of slightly less than three years ago.

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During this period some 467 aliens whom we had apprehended were interviewed by Internal Revenue Service agents. They assessed from these 467 aliens, they assessed $56,411.30 in unpaid taxes.

They collected on the spot $34,415.39 for taxes.

This was primarily on the basis that aliens were declaring more dependent than they actually had. The would claim, say, four or five dependents, but upon interrogation by the Internal Revenue agents they determined they were not eligible to claim dependents, so consequently this was the reason for the taxes being assessed.

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"The United States Immigration Service does not enforce the Immigration laws as written."

Do you agree or disagree with that, and if so, why?

A. I agree that we do not enforce them as written to the degree anticipated by the laws. And this is primarily due to the fact that there are some new laws needed, but even if we had the new laws our resources are not sufficient to handle the job which we are involved with.

The Immigration Service is a worldwide organization. We have offices in all parts of the world. The appropriation for all of the Immigration Service is less than for the budget of the City of Dallas.

There are fewer Border Patrolmen on the 2,000-mile border between the United States and Mexico than there are policemen in Dallas, Texas.

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About what percentage of the people that you come into contact with who you deem to be here without documents or here illegally do you actually go through a deportation hearing for?

A. A very small percentage numbers-wise. Most of them when encountered admit alienage, admit deportability. And then they have a choice of going to a hearing before an immigration judge or accepting voluntary departure from the country. And most of them admit deportability and do elect departure under voluntary circumstances.

Q. And do you have any idea how many of the deportation cases that you actually take to deportation hearings you actually lose?

A. Well, inasmuch as we take a very small percentage to deportation hearings, we only take cases that are pretty much open and closed cases.

And, our percentage that are not found deportable is very low.

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TESTIMONY OF DR. ROBERT TIPTON

ROBERT TIPTON,

was called as a witness and, having been first duly sworn, testified as follows:

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Now essentially what this map shows then is the areas in which we have major teacher staffing problems in the State.

For example, on 10-8, the teacher-pupil ratio in Bilingual education programs you will notice that, for example, in region seven where we have four programs there are 439 children, four certified teachers – all of them, incidentally, at Tyler – three teachers on permits, for a student teacher ratio of certified teachers per children of 109.75 children per teacher; and using also the three people on permits, 62.71 children per teacher.

In region four, for example, using only – which is the Houston area here, using only certified teachers at 11,543 children and 340 teachers, we have a ratio of 33.95 children per teacher; with an additional 60 teachers on permits, the ratio drops to 28.86 children per teacher.

We could go through all the regions. You can look at that, sir, in 10-8.

Essentially this means that the bilingual programs in these areas indicated are already under tremendous pressures from just numbers of students.

So that additional children means that we have to conceive of other ways of extending the teachers' ability to deal with these children.

In some instances –

THE COURT: That's the orange areas?

THE WITNESS: Both orange and blue, or green on the small map.

THE COURT: All right.

THE WITNESS: One of our greatest problems is in these areas particularly we have teachers who may

teach as many as 60 children in the period of a day.

It is – as a teacher I can say this – it is extremely difficult to keep up with 60 children and where they are in all of their subjects and be able to fit the instruction to each child adequately with that many children passing through the classroom per day.

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programs at sixth through twelfth grade are permitted but are not funded by the State.

Q. (By Ms. Dasher) How many districts in the State have bilingual programs? Does 211 or 311 sound familiar, whichever one it is?

A. I have on this talley sheet 205. I believe that is correct.

Q. And how many districts are there in Texas, school districts, approximately?

A. Eleven hundred seven, I believe. It is in that neighborhood.

THE COURT: Is there any scientific reason why some children, or some people, have more difficulty in learning another language than others?

THE WITNESS: There probably is, but we don't know what it is. It is certainly an observation that in any group of people, whether it is first language or second language, certain children become much more proficient in the language than other children. Partially it may be early training, early exposure to the language.

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of this is not coordinated, then the Spanish-speaking teacher teaches arithmetic and the English-speaking teacher teaches something else. And how can we be sure that the English-speaking teacher is teaching the child to speak that kind of English with the kind of vocabulary that is required to express what is being taught in all the other subjects, for example, social studies?

Q. Well, it's my understanding that you want to get a certain number of teachers and that's based on how many ever student you have to serve?

A. That's true.

Q. So if you have two teachers, does that increase how many kids you have in the classroom?

A. Yes.

For example, assuming that we have an average of 30 children that are in a classroom in a self-contained situation, I would assume that if we had two teachers that we have an area that would hold 60 children. If you don't you have problem.s

Now, Team Teaching is good if the teachers work together, have the same sort of attitude toward the children and are both dedicated in the same way to the children. Methods don't have to be agreed, but the attitudes have to be the same. And they have to agree sometimes to disagree. If that's not there, then you have competition between the teachers. And you have developed, unfortunately, in all too many cases, a your kids and my kids attitude.

The English-speaking teacher who has a certain number of children of limited English-speaking ability in her group will really belong to that teacher over

there who speaks their language.

And while my English-speaking teacher teaches over there, they are really my students.

You have to break that attitude among teachers.

Now, the advantage is that if you can get two teachers that can work together, then the children can identify the language with the person. Now, this is possibly the first thing that children learn to do in terms of language.

My stepson, for example, spoke both Spanish and English from the time he was a child because there was a Spanish-speaking maid that kept him all the time while his mother was teaching. So

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Q. What in your opinion would be the effect on our bilingual education system if we added, oh, maybe 6,000 to 9,000 elementary children, for example, to a city like Houston, if they were LESAB children?

A. In the city of Houston it would be disastrous because they already have a 34 to one ratio of student to teacher ratio. They are already extending their teachers as far as they can extend them using non-traditional approaches.

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Q. So ever since there have been children of limited English-speaking ability?

A. Since the Republic.

Q. Do you know what the method of teaching children of

limited English-speaking ability was utilized in the schools throughout the State of Texas prior to 1972?

A. My own experience would be based on the three years during the Second World War that I was in the schools in the State of Texas, and essentially it was nothing more than a regular school system doing a regular school program in English with no special instruction or anything else.

Q. For clarification, could you tell me why it has taken the State of Texas in excess of 100 years to implement a bilingual program?

A. May I point out, sir, that it has not taken the State of Texas 100 years to implement the program.

We had bilingual education in the State of Texas with a number of languages up until the time of the First World War.

At the time of the First World War – it's very interesting – we had a law passed that required education and the administration of education be conducted in English because of the

[page 3481]

I cannot say we have a surplus of teachers. The fact is no matter how I take the figures I can show you that the State needs a minimum of 929 more bilingual teachers. It may be 1500 more. I don't know.

I can also say California, according to the people out there, needs 4,000 more teachers.

I know that from all over the United States recruiters come to our Texas colleges and universities having bilingual programs looking for bilingual teachers.

I don't think we have a surplus, and I think that it is only in cases where you look at figures like this, and do not take into consideration actual circumstances, that anyone can say that we have a surplus of teachers.

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though probably 95 to a hundred percent of the children in Rio Grande City are of a limited English-speaking ability, and that ratio is much too high and should be lowered.

Again that goes back to what we were talking about in previous cross-examination about taking into consideration local conditions

And in estimating that need, I have simply looked at numbers, not on adequacy of programs.

Q. Let me correct you because I intentionally misled you. I found on the page in the deposition – well, let me read the question and let you respond and see if you still agree with it.

This is my question to you: "I thought earlier on you testified that you believed in 90 percent or approximately 90 percent of the school districts, there were enrolled more than what you considered to be the optimum number of students."

And you response was, "No. I said 90 percent of the school was – we had adequate programs, at least 90 percent of the schools.

Do you still agree with the statement you made?

A. In talking about the programs, yes.

And, subsequent to that, I did produce the estimates based on the teacher-pupil ratios, which

[page 3508]

classroom group for instructional purposes.

Q. Has TEA made any assessment as to the, other than your figures which you produced for this trial, as to the shortage or lack of shortage of bilingual teachers in any other state other than Texas?

A. To my knowledge, I am the only one that has ever done this in the State of Texas.

In other states the only thing I know is what I quoted from Marjorie Broat, where she quoted a need of 4,000 teachers.

I do not know the basis of how she got that figure.

Q. Are you aware of the total amount of Federal dollars that go into bilingual education in the State of Texas?

A. No.

Q. Do you recall in your deposition stating at page 30, line 15, "If we have a shortage of teachers, as we have in many places, we may have Team Teaching where we have a mass of Spanish-speaking and English-speaking teachers to teach a large number of children."

Do you recall making that statement?

A. Yes.

Q. So it is a fact that Team Teaching is used as a methodology in the State of Texas?

A. Certainly. So is resource teaching.

Q. Isn't it also true that one teacher in the Team may in fact be monolingual solely in English?

A. This is true. This is the reason that we have to use it in cases where we have an inadequate supply of teachers because by the very nature of the thing, that teacher has a certain number of children and you can increase the ratio of limited English-speaking ability children to your bilingual teachers because the other teacher is taking up part of that by teaching all of the subject areas in English.

Now this is not as good an approach, as I have already testified, as a self-control classroom which then puts us back down to a lower ratio.

But where we have an inadequate supply of teachers, we have to use non-traditional approaches like Team Teaching, resource teaching, to attempt to provide at least some assistance, special assistance, for these children.

Q. From the standpoint of your expertise as an educator in bilingual education, could you explain why it is better in the various programs that you have now that you not have the optimum student-

[page 3515]

special assignment permits, short of the certification? How many teachers in the State of Texas have that?

A. The number I gave you was 881, I believe.

Q. And how many hours of training was required for those people to obtain that permit?

A. As I have already testified, the special assignment permit requires that they have six semester hours of training.

Q. And a normal teacher certification?

A. In the undergraduate program, we require 24 semester hours.

Q. Are teachers compensated during the 12 hours that they work towards that temporary permit?

A. No, sir, just as they're not compensated for any other program.

Q. Has TEA ever discussed, or have you in your job as attempting to facilitate an increase in the number of bilingual teachers, ever discussed the possibility of teaching – of supplementing those 12 hours for people, for teachers?

A. What do you mean by supplementing the 12 hours?

Q. I mean, providing them with some compensation for taking those 12 hours of additional training.

A. We have no legal authority to do so.

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TESTIMONY OF
EDMUND T. EMMER

[page 36]

would not necessarily impair their effectiveness.

For teachers, however, whose management skills

are average – and there are a lot of average teachers, which doesn't mean they're not good teachers, but there are a lot average teachers whose management skills are less than perfect – it probably would affect their management capability. But there are some teachers whose skills would not necessarily be impaired. Disregarding the skill of the teacher for the moment, I would like to focus in on the characteristics of the children.

Is it sill your testimony that the addition of a large number of children might not necessarily affect adversely the classroom, but that it would depend on the characteristics of the children?

A. That's correct.

Q. That is still your testimony.

I believe your attorney just stated that you were not an expert in the characteristics particularly of undocumented children, is that correct, basically?

A. That's correct.

Q. In fact, I believe you told me, did you not, during your deposition that the data you were using

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circumstances you would see much more management difficulty situations. And on top of that, effective classroom management, the teachers aren't trained bilingually or don't have techniques to deal with the children and then you will find again a much more difficult management situation.

Q. I believe you just stated, and I quote, that an effective manager may handle these things. Tell us what

techniques or what ways would such an effective manager use in coping with these things you have identified as difficulties.

A. *Well, first let me say I think an effective manager could handle increased numbers of students –*

Q. I see.

A. – and not necessarily all the problems you might drop upon that teacher. But the more effective manager develops systems to cope with constraints.

The teacher, if we are talking about great numbers of students, would probably spend a lot of time in teaching rules and procedures, would make sure that the class was with her, was able to function without her direct supervision before she started out on any kind of small group activity. We would find the more effective manager.

TESTIMONY OF
MR. MARK FLOLID

[page 85]

Have you ever done any studies with regard to utilization of the census with regard to Spanish people? Any other work you have done on that question?

A. Yes, several times.

Q. With regard to this particular study, did you state in your deposition and is it fair to state – the page – I'm looking at page 55, lines 12 through 14 – "purely my estimates are trying to pick up those that I consider illegal aliens or undocumented aliens in this population."

Do you recall making that statement in your deposition?

A. Yes.

Q. Do you recall making the statement that is at page – same page, page 55, line 16 through 19, "I just simply tried to come up with an estimate of those that I consider would be considered illegal – is that the proper term – in the Texas school system."

Do you recall that statement?

A. In the Texas school system? Yes, generally. Yes, I do remember that.

Q. Would it be fair to state that your task was to estimate the number of undocumented alien children

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didn't have an answer to that.

MR. SCHEY: I apologize, Your Honor.

Q. Could you tell us just as you apprently in your study – you call this 111,000 potential undocumented Hispanic school age population?

A. That's correct.

Q. Do you know what you would call this population here?

A. I would label it the same.

Q. You would label this 80,000 potential Hispanic undocumented persons?

A. 1970.

Q. Does that suggest to you that if that were accurate that there was a large number of Hispanic students undocumented who maybe voluntarily are not going to school?

MS. DASHER: Your Honor, he's going through the same facts of evidence that we went through earlier.

MR. SCHEY: I may clarify it to Mr. Florsheim.

There's a study in which he is able to show there are 111,000 people out of school. The assumption he makes, that's one thing to do that, but his study calls those people undocumented children. Now if he can draw assumption about the 111,000 down in 1980 through his study – he's working with 1970 data. I assume he's making some assumption about who the 80,000 is. If he can't make assumption about the 80,000, I find it difficult to understand how he can make assumption about 1980 since this is all extrapolation and if there's error in identification, it's carried forward.

So I think I am entitled to ask him to explain to us what he assumes – how you would label this 80,000 group and why you would label it that way.

Q. Can you tell us why you would label that potential undocumented population?

A. Again, as I explained earlier, if you do the same procedure for the total population, you come up with similar results, so we are no longer speaking of total population. So the 111,000 is (inaudible) three million, and if you do this the studies I ran are characteristics of undocumented aliens.

Q. Would you speak up just a little?

A. The overwhelming majority of aliens tend to be of Spanish-speaking origin, I understand, in Texas. Thus if in fact I were to estimate a population of undocumented aliens, I would believe it would be in those categorized as the Spanish language, Spanish surnames – your common categories for identifying Hispanic population in the Southwest states. And in fact we do come up with similar results.

Q. Let's try to clarify what you're saying. You're saying this is just – this residue here is just for Hispanics, is that correct?

A. That's correct.

Q. This is just for Hispanics, is that correct?

A. That's correct.

Q. That is correct. You're saying if we do the same calculation right here for Spanish, blacks and whites, you're going to come out with the residue that is just a little different than this?

A. No, that's what I found in '75 through '80.

Q. And you are now making the assumption you would find the same thing for 1970, is that correct?

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TESTIMONY OF
JAMES PETE WILLIAMS

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JAMES PETE WILLIAMS,

was called as a witness by the defendants and, having been first duly sworn, testified as follows:

Q. Mr. Williams, the Court has your vitae. Would you just highlight your experience with reference to education and desegregation and the overlay between the law and those three fields.

A. Well, I'm a graduate of Texas Law School in '52. In '57 I commenced teaching in public schools, and in several short years acquired the teaching certificate and a Texas School Counselor's Certificate. During the '60s I did counseling work, public school work, college education work. I served as a counselor for the Gary Job Corps and ultimately became project administrator of TEDTAC, Texas Education Desegregation Technical Assistance Center.

Q. What has been you work recently – well, not necessarily recently, but what work have you been doing in the areas of desegregation and what role have you performed professionally?

A. In desegragation I commenced doing that kind of work with TECTAC and serving as a court appointed expert for purposes of presenting evidence or working plans or doing whatever the Court requested me to do. As of this year I'm doing that for Judge Justice in a couple of current cases. I have done some of it all through the decade.

Q. In what courts have you been a court appointed expert?

A. Judge William Taylor in Dallas.

Q. Is that the Dallas desegregation case?

A. The Dallas desegregation case. Before that, Judge Connally in Houston in the Houston desegregation case; Judge Singleton in the Crosby Independent School District case; Judge Dawkins in the Northern Parish of Louisiana. I did some work for a Mr. Wolfe in the Cisneros case and testified when this Court sat in Victoria. Judge Justice – I think that's it.

Q. Any places outside of Texas?

A. I wrote memorandums for the Court in the Davidson County case in Nashville. I did consultant work for the Nashville Metro School District after an order had been entered. I did not prepare the plan. And I wrote a memorandum for Judge Garretty in the Boston case.

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Q. Are you familiar with the issues that are involved in this case with respect to what children are not being given a free education in Texas?

A. Yes, I am.

Q. In your opinion, what would be the effect of admitting additional minority students who are – and assume this, that they're are not subject to prediction or identification. What effect would that have, a court order desegregation plan over the next two years in Houston, let's say?

A. You said over the next two years, and you said in Houston?

Q. Yes.

A. It would just invalidate whatever plan is in effect. There's no money.

THE COURT: You don't mean invalidate, you meant make it difficult to implement.

THE WITNESS: Yes, sir, I didn't mean legally to change anything, but the implementation of it would be impossible is what I mean.

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Q. Would an addition of a substantial number of one-race minorities to the inner cities of Houston and Dallas cause what you have called resegregation?

A. That's the purpose of my answer a little bit ago when you said in two years' time. You just couldn't do that without making it more intensely resegregated, if that's the word you all are using.

Q. What do you feel would be the impact in a smaller district where maybe you have three elementary schools and one junior high school under the existing desegregation order such as 5281?

A. Well, there's a classic situation that I like to think a lot of people never think about because of the 1100 school districts in Texas, maybe seven or eight hundred of them are like that.

And you bring in a dozen families, 12 to 15 to 20 brand new families, either because of a nuclear plant or because of the outcome in this case, and you have in your school system, if you're nip and tuck as the TEA folks say, if you're running about 60 percent, then you've got a campus under 5281 that is not creating an objection according the Judge Justice's order.

If you bring in 10 to 15 families as there are minority students, and they all go to one elementary school,

that campus is going to become 66, 67, 68 percent immediately. When that happens, the full force of 5281 applies to that district. There's a whole bunch of things they're supposed to do. There's a whole bunch of things TEA is supposed to do. There is no way to say that any particular minority group moving into a small town can just be absorbed and doesn't make any difference. Under the existing U.S. versus Texas, it makes a big difference.

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Q. Are there any special problems created or that you have considered or worked with over the years that deal with the – if there are any tensions in the brown-black community when you put those minorities in the schools with the whites?

A. Oh, goodness. My first experience with tension between brown and black was with the Gary Job Corps. That was a very intense experience. I learned that they are, along with all the rest of us, capable of having incredibly intense negative racial feelings towards each other. My next real life experience with it was right here in Houston because I was determined not to pair two elementary schools because – for instance, one was all black and one was all Mexican-American – and of course, normally, all the schools in the Houston District at that time were all something. They were all white or all black or all Mexican-American. I was determined not to pair a black and a brown school, as we call it. I was on very shaky ground because this court had not entered any judgment in the Cisneros case, and I was actually ordered by the Justice Department to consider the data only in the context of black and white and that Mexican-Americans would be considered Caucasian. That's the way the plan had to be. I just ignored the order and prepared one that considered it on a tri-ethnic basis, and

to the extent that we could, we tried to make things even between the three. Then, the next choice was not to put a totally black and totally brown school system together because of the intense difficulties that creates. I've maintained that policy for the next 11 years.

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Q. Limiting your answer to Arizona, has Arizona experienced any problems with their educational system by virtue of their proximity to Mexico, if you know?

A. I've served as a counsel to Senator Anne Lindeman who is chairman of the Education Committee in the Arizona Senate, for two reasons, to help her try to figure out how to cope with some of this problem that we're talking about in this case --

Q. What do you mean by "this problem"?

A. She's often pointed to me the city of Nogales as a great example and also she refers at times to Phoenix as a great example of where people just come and go. They are unable to identify who they are, who they belong to and where they are going to be next year. Senator Lindeman's version of it would be that it is an intense problem, and I've been dealing with her for three years.

She attempted in Senate Bill 1008 about a year and a half ago to establish a constitutional compact between California, Arizona, New Mexico and Texas. I'm not talking about that source of silly willy-nilly called the Border Commission, 507 Commission or something. I don't even know the name of it. I'm talking about a constitutional compact that the four states would have entered into under the Federal Constitution. She got a good response in the Senate and

was fixing to – she got a joint – what do you call it – a bipartisan committee to adopt it all except one vote. She though she was off and running, and the government killed it.

Q. What was the thrust of the constitutional compact?

A. It was hopefully going to attempt to deal with several major problems, one of which was the education of undocumented alien students in the four states, how to cope with that, particularly in the border districts.

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Q. So you would feel that it would not be a valid approach to try to determine where the children who are the subject of this litigation would impact on the State?

A. It would certainly be one approach. It would be my estimate, if you were to ask me, when you come to the City of Houston, they're going to live out around Roosevelt, but after that, if you said, "And are they always going to be there, shall we build a new school at Roosevelt," if I were a superintendent of HISD, I would take a dim view of any plan of that sort because they might all be gone next year.

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Q. (By Mr. Schey) Can you tell us what the impact is, and this is just looking at Hispanic schools, they conclude the very – this is out of February 7, 1980 – they conclude they're underenrolled by 2,500 students. What is the impact of that underenrollment on desegregation plans?

A. I can certainly testify to that because I never had a plan before me yet that didn't present what I used to

call magnificently beautiful enticing data. It's like, "Ah, we can make this work." I've been through this in Houston. I've been through this in Dallas. They're overbuilt, and we're going to put the folks in the right place, and we're going to prove they can do it. If we make them do it, I want you to know that it is incredibly difficult. You can't just take a list like this and say there is going to be 175 students at Highlands because that's apparently the number of classroom seats that are not occupied. The cafeteria may not take those 175 students. They may be teaching four lunch periods right now and be on their knees trying to operate a school there. You have to go to the building. You have to see if 175 students can be served there, and that is not determined by vacant seats.

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Q. (By Mr. Schey) Do you understand my question, sir? Given the fact that you already see all these problems with enforcement of the desegregation orders which are being caused by black students, by brown students, by white flight, et cetera, I'm just wondering if the additional problems you see being caused when we bring in another portion of minority students justifies keeping those students out of the schools?

A. I wrote a memorandum in 1976 for Senator Lindeman and the Education Commissioner of the State recommending that they be excluded. I would write it again today. I would exclude them.

Q. Could you just explain the basis for that decision?

A. We have a very definite amount of resource available. We have arrived at a point in history, and history is my hobby although I don't claim to be an expert, where we cannot sustain any further drain on that resource from anybody. I doesn't have anything to do

with the very charitable friends to the South. We can't sustain it from the Canadians, either. I think as an administrator or as a lawyer or as a taxpayer, you arrive at a point where you simply say, "Enough is enough, we'll do what we can with what we have." That's exactly what I'm trying to say; I would exclude them.

If, in fact, they are going to be here, that's a Federal problem. If, in fact, they're going to be educated, that's a Federal problem. We have educated the Indians, and Texas hasn't paid for that. I think that's appropriately done, and perhaps that's the way to do it for people that have no documentation. It's a Federal problem.

Q. (By Mr. Schey) Okay. Just if you would take the hypothetical -- or I present this testimony to you as a hypothetical, his studies have indicated that there are approximately 10,000, a total of 10,000 undocumented children in the State of Texas. If, in fact, if you just take that as a hypothetical, if, in fact, there are 10,000 children in the State of Texas who are undocumented and assuming that they were spread out throughout the state such -- namely, that you would locate them in areas currently populated by Hispanics fairly evenly throughout the State, based on those numbers, are you able to state what the impact would be on desegregation in the State of Texas?

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A. Taking it as a hypothetical, I couldn't possibly give you an answer that would serve you any purpose. I don't for a minute believe that there are only 10,000 in the State. Of course, I'm not going -- I've told you I don't have a survey, and I'm not an expert on where

prople are this afternoon, but I can't deal with that as a hypothetical. They are not also going to be spread out over the State. When you say something like that, it's –

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Q. You mentioned earlier – you said that if you were asked to decide whether or not undocumented children should be educated, you would decide to exclude them because as you see it, it's a question of resources and the pull is finite and you can only push and pull so far?

A. That was part of my reason for excluding them, yes.

Q. So, if the idea behind that that you more or less have to save money, and in order to save money, you could sort of draw the line somewhere, is that what you were getting at?

A. I'm not saving money. It's not in that context. I'm 51 years old, and all my life to me the vision of the Statue of Liberty is one literally of what I have read in the inscription looking at it face to face, send us all, send us everything, the poor, the weak, whatever, we'll take care of it. Those days are finished. That's over with. We've arrived at a point in American history where we can no longer sustain that. We cannot take the dissident populations from any country. McDade County in Florida is a gigantic example of educational problems because we took the problems that presumably, I'm just paraphrasing here, that possibly Castro is delighted not to have to cope with. We took all the refugees from Cuba in one spot because that's where they could go to. I would not have been so inhumane as to have pushed them back in the ocean, but I do suggest that the point at which this country can no longer continue to do that, whether 9,000 Iranians the

last three months or 10,000 more undocumented workers next year.

We have arrived at that point. It's finished. We can no longer sustain the reception of any group of people in this country. We've got to stop and breathe and plan how we're going to preserve a workable system before the inner cities of Houston, the inner cities of Cleveland, the inner cities of Dallas fall down upon us.

Q. Mr. Williams, is it true that school systems have more or less uniformaly offered administrative cost difficulties, statistical problems to – it's not statistical – space problems and, let's say – what else did you mention – transportation problems, shortages of buses, is it true that these kind of problems have been offered since the beginning of desegregation, that they occurred more or less over and over?

A. I'm one of these rare people that's in a position to say that I found out the hard way that they are true problems. Sure, I used to see that as a superintendent's line as to why he didn't want to let any of the black folks into his school. I helped push a lot of black folks into those schools, but in doing so, I found out and I'm honest enough to say that we diluted the system badly, and at times we endangered even the physical life of students. We did it all in the name of equal access, which I shall die for if ever asked to do so. But I shall not tell you that that is equal educational opportunity because it is not. That's been a first, and I do think those superintendents were entitled to more integrity than I used to given them ten years ago.

[page 169]

Q. Do you think the children of undocumented immigrants would be excluded from education – public

education in the State of Texas if their nationality or origin was, say, Irish, as opposed to Mexican-American?

THE COURT: Even on St. Patrick's Day?

A. It's my testimony, sir, that if they were undocumented, they just simply should be excluded. I don't care what they are.

Q. I'm asking you: Do you think they would be excluded now?

A. It's a hypothetical in the context of my answering you, and my answer is that I think they would and I would exclude them. You're trying to ask me, I suppose, is if they were white, would they be excluded. I would suspect that they would be getting the same treatment they're getting right now, and that is, everybody is looking the other direction. Everybody is waiting for George to solve the problem. To me, it's a Federal problem whether Irish, white or black or from Cuba. They should be educated, apparently, in a Federal system that's to be established to take care of the Federal problem, or they should be sent home.

March 18, 1980
VOLUME XXV

TESTIMONY OF
NORMA VILLARREAL

[page 3]

NORMA VILLARREAL

was called as a witness and, after having been first duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION
BY MS. DASHER:

Q. Would you tell the Judge exactly what your educational background is and whether you are certified?

THE COURT: Let me get her name first.

What is your name, please?

THE WITNESS: Norma Villarreal, V-i-l-l-a-r-r-e-a-l.

THE COURT: All right, Ms. Dasher.

Q. You are teaching in the Brownsville school sright now. Is that correct?

A. Yes, I am.

Q. What teaching certificates and endorsements do you hold?

A. I have a BS certificate from Pan American University, a bilingual certificate and kindergarten endorsement.

[page 6]

Q. Have you had any particular experience with children who enter the school year at different times, and how do you handle those if you have that kind of experience?

A. Yes. We have this going on all throughout the year. They come in slowly. We have got some children coming in in October, others coming in in January; and what we do is we go ahead and kind of stop what we are doing and try and take time out to catch these children up with the others.

Q. And does that take time away from the other children?

A. Yes, it does take time away from the others, because you have to drop everything, give other children individual instruction when possible.

TESTIMONY OF
LON C. WHEELER

[page 51]

A. All right. My name is Lon C. Wheeler. I am now Executive Director of Attendance, Transfer, Demographic and Pupil Assistance Department.

I have a Bachelor of Science degree with North Texas State University, and an administrative education Master's degree from the University of Houston.

[page 52]

Q. Do you enforce the HISD policy with regard to admission of undocumented aliens?

A. Yes, we do.

[page 53]

Q. What, generally, is that policy?

A. That policy is one in which if they show evidence of the Immigration Department having knowledge they are present, we allow them to enter school.

March 19, 1980
VOLUME XXVI

TESTIMONY OF MICHAEL SAY

[page 45]

MICHAEL SAY, having been previously duly sworn, resumed the stand and testified further upon his oath as follows:

[page 47]

Q. In regard, if those schools were impacted as we have suggested they might be, would there be any effect on your Title I federal funding?

A. There would certainly be implications for how we handle our ESEA Title I funding for disadvantaged schools because 18 of the 41 schools on this impact list in fact are Title I campuses. On those campuses there is a consideration that we have to give very close attention to and that is the matter of comparability.

Title I campuses must remain comparable in order for us to continue to receive the Title I funds. We receive about $15 million in Title I funds annually.

What this means is that expenditures per pupil on those campuses out of state and local funds must be equal to or greater than the average expenditure per pupil on non-Title I campuses.

In addition, the pupil-professional ratio, number of pupils on the campus to the relationship of that number to the number of professionals on the campus must be less than or equal to the average pupil-professional ratio on non-Title I campuses.

The implications are that if you attempted to handle the impact of students by simply adding students to classes on those campuses you would run into a problem in comparability. In fact, as soon as that ratio of students to professionals exceeds the average in the District you would have to add additional professional staff to those campuses simply to keep them comparable in order to continue to receive the Title I funds.

It is a complicated issue. There would be implications.

[page 57]

Q. Dr. Say, there has been a lot of talk in this courtroom about the declining enrollment in the Houston Independent School District. Has there been any corresponding decline in the H.I.S.D. budget over the past several years?

A. No, sir, there has not. That is a situation that we have to continue to explain, particularly to taxpayers when it is at the budget making time of the year.

We have declined in enrollment over the last 10 years approximately 50,000 students. Over that same period of time you have had of course the effect of inflation. You have had the effect of lower pupil-teacher ration over the years. You have had the tremendous effect of the supplementary programs that have been added in the district to meet the needs of specific student populations, expansion of programs to meet the need of the handicapped, programs to meet the need of limited English speaking ability students, many, many programs in basic skills working with a smaller pupil-professional ratio to work with students who are functioning far below grade level attempting to bring those scores up.

There have been many steps taken over this period of time to improve the quality of education in the Houston School District. As a result there definitely has not been a decline in the cost or in the budget even though there has been a decline in student population.

[page 131]

Q. I would like to move to a comparability problem. You mentioned with respect to Title I funds. Does comparability require that the student-professional ratio be under the district wide average or equal to the district wide average?

A. Equal to or less than - the purpil-professional ratio, equal to or less than the pupil-professional ratio on the average for non-Title I campuses.

Q. What is the purpose of comparability laws as you understand them?

A. To insure that you provide the same level of local and state support to disadvantaged students that you would otherwise provide and that the Federal funding is supplementary support as opposed to supplanting or replacing what you would normally spend out of local funds.

Q. Does that seem to be a reasonable requirement to you as an educator?

A. Except for some technicalities in that a Title I campus, individual campus, may be a smaller campus than the average size in the district. Under those circumstances because it's not - excuse me. I am using the opposite example that I should.

If it's a larger campus than the average, then because of the cost effectiveness of the larger campus,

the cost per pupil would be less. Nevertheless, you can't take advantage of that. You have to go ahead and add to additional local money to get it at or above the average expenditure in the district.

TESTIMONY OF REPRESENTATIVE TONY POLUMBO

[page 142]

TONY POLUMBO

was called as a witness by the Defendants and, having been first duly sworn, testified as follows:

EXAMINATION

By Mr. Wilson

Q. Would you just briefly tell the court what your position is in State Government at this time?

A. I am a State Representative from northeast Harris County currently serving the end of my third term. I am a member on the Business and Industry Committee and the Public Education Committee.

Q. Representative Polumbo, have you ever introduced a bill into the House of Representatives dealing with undocumented aliens?

A. Yes. I did. I introduced a bill in 1977 and '79 both.

[page 143]

Q. Could you just briefly explain or possibly read the bill for the court?

A. I can explain the bill starting – it's the same bill that I introduced in the '77 session also. It simply holds to

the fact that if an employer knowingly hires an illegal alien with no exceptions it is a felony offense, third degree felony.

[page 144]

Q. From your personal knowledge what was the basis of the opposition to your bill?

A. I believe the basis of opposition was fear of the discrimination on surnames that the Mexican-American citizens of our country were concerned that perhaps there would be too much scrutiny in the citizens actually getting jobs and I believe that's where the major concern was.

I believe another concern on a minor basis was that folks that were hiring them were a little concerned about not having to be able to hire them.

March 21, 1980
VOLUME XXVII

[page 2]

TESTIMONY OF JAMES L. DUDERSTADT

JAMES L. DUDERSTADT

was called as a witness and, after having first been duly sworn, testified upon his oath as follows:

[page 3]

Q. Mr. Duderstadt, the Court will very shortly have a copy of your vitae, but would you briefly summarize what your academic background is and what your employment has been over the last 20 years or so?

A. I hold a Bachelor's degree from Chico State College in Chico, California; a Master's degree from the University of Denver, Denver, Colorado; and, completed all work except for the dissertation for a Doctor of Philosophy at the University of Denver, Denver, Colorado.

I have a certificate of broadcasting from the National Broadcasting Company in Stanford University in Palo Alto, California.

My employment has largely been in fields of education, with three years spent in the Department of State, and about four or five years in private business at which time I was also involved in education during those two, otherwise it has been teaching and/or administrative work in colleges and public school systems.

Q. And during the course of your employment have you spent some time in the Virgin Islands, and would you describe what your employment was there?

A. I spent the last twelve years in the Virgin Islands. I was employed by the College of the Virgin Islands and by the Department of Education in the Virgin Islands.

And, also, I was in private business during that time, but during the time I was in private business I was also working as an advisor for the Commissioner of Education.

Q. Did you teach in public schools at all while you were there?

A. Yes, I did.

THE COURT: What grade did you teach?

THE WITNESS: From seventh grade to twelfth grade.

Q. (By Ms. Dasher) Now, Mr. Duderstadt, would you describe for the Court what transpired in the educational system of the Virgin Islands starting in early, approximately, 1968?

A. In 1968, in the fall of 1968, we were still under the usual standards, that is, we were not accepting the alien students into school at that time. Our enrollment in 1968 was 12,292 as of opening of the school in the fall of 1968.

In 1969 we began to accept aliens into the school, and our enrollment jumped from the fall of '68 to the fall of '69 from 12,292 to 14,270.

[page 8]

THE WITNESS: In view of what was just said, I would say I could shorten things.

During the period from 1968-69 until 1976-77 the school enrollment jumped from the 11 – well, roughly 12,000 bracket, 11,887, 12,292 are the two successive years, '67 and '68, to 25,571 in 1977.

These figures were obtained for verification for my own information from Mr. Komise, who I said was the Director of the Department of Statistics for the Virgin Islands Department of Education.

Q. (By Ms. Dasher) Now, Mr. Duderstadt, during that period of time from 1968 and ending when you left the Islands, what occurred that is based on your personal knowledge in the schools and to the schools in the Virgin Islands?

A. Well, during this time I was working very closely with the schools either in teaching or administration or in an advisory capacity. And when we had a court ruling which required that we continue to admit aliens into the school, this ruling essentially was for the documented aliens, although at that time the schools were opened up to all aliens.

The influx of students from the, what we refer to as the down islands, being the islands that are to the east and south of the Virgin Islands, was tremendous.

And it wasn't just a question of the students who were there at the time the ruling transpired, but we had a heavy, heavy influx of students each year after that.

[page 10]

THE WITNESS: I was there, and part of my work had to do with the registration of students.

And when they came into school – and, particularly into the Nazareth Bay High School, a junior high school – and we had students arriving undocumented not really sure who they were supposed to say was their parent or guardian or where they were living, coming from, such islands as Dominique, the British Virgin Islands, St. Kitts, Nevis, Anguilla, Antiqua, Trinidad, Tobago, Grenada – largely from all of the English-speaking islands of the Carribbean. We had very, very few students from the French, Dutch or Spanish-speaking islands, extremely few.

The influx of students into the islands, of course, first of all caused a tremendous shortage of classrooms because we had – we were short when it began. And after the – this rule – after this ruling, and we had to admit the alien students, we had to open build-

ings that had been previous condemned such as Lincoln School. We were using old World War II barracks for classrooms. We could not obtain sufficient numbers of teachers. We had many classes that were being held by teacher aides who had no more than a high school education.

We had many classes that simply didn't have a classroom teacher.

THE COURT: How did those teacher aides do with a high school education?

THE WITNESS: Very poorly in particularly teaching high school students, because they simply did not have the background.

Even in the elementary school it was very unsuccessful.

My son was an A and B student when we moved him to Houston two and a half years ago. He attended – came here into the Mark Twain Elementary School. He had not had an achievement test or placement test though his reports were highly satisfactory.

When he entered Mark Twain instead of 90's and 100's on tests, he was making 10's and 15's.

And he was given an achievement test to see where he would rate. He was rated fourth grade, second month.

Now within a year's time – we were lucky, we had a very fine teacher at that school and he kept my son at the school for 30, 45 minutes most of the year.

By the end of the year my son was back into the top percentage of his class, which indicated there was

nothing wrong with his ability as nothing had been indicated in the Islands. He simply wasn't getting it. The reason being, many of our schools, his included – I should say most of the schools – were reduced to half-day sessions. One group came at 8:00 o'clock in the morning and went until 12:00, had lunch from 12:00 to 1:00 with the students who were coming for the afternoon session. The afternoon sessions had classes from 1:00 until 5:00.

So they were reduced by just about half the time that they were allowed to spend with the teacher.

In high school our class, including five minutes for change of class, had been an hour. It was reduced to 35 minutes. There is no way – speaking as a teacher – there is no way I can cover this 30 minutes what I would normally cover in 55 minutes.

[page 14]

We had a very large number of the aliens coming in that were coming from islands where the school system was not comparable to that in the U.S. Virgin Islands. And we had students who were 10, 12, 14 years old in the first, second and third grades, which created some very strong educational problems.

Many of these students were so far back that they were put into special education classes, depriving the citizen, U.S. citizen in the Islands of special education because they were better prepared than the others, so they were pushed up in the regular classes where many of the aliens took the special education classes, which created again learning hazards for us.

Q. Mr. Duderstadt, the Virgin Islands by virtue of not being a state has somewhat of a different financial arrangement with the Federal Government than most states, does it not?

A. Yes. We receive all the same Federal programs that are offered to the states here. In other words, the Federal funds for education, for housing, all of these programs we have.

The major difference is in that we pay Federal income tax in the Virgin Islands, that dollar stays in the Virgin Islands. It is also matched dollar for dollar by the Government, Federal Government in Washington. So when I pay a thousand dollars of income tax, that meant the Virgin Islands got $2,000.

So that was the basic difference there.

In spite of this the Islands right now is on the verge of bankruptcy.

THE COURT: Why is that?

THE WITNESS: Because of tremendously heavy increases in cost of education for one thing, and welfare is the second.

[page 17]

Q. (By Ms. Dasher) One last question. You did not have to deal with a bilingual program, did you?

A. No. The studnets who were from the Spanish-speaking islands largely went inot Puerto Rico.

[page 20]

Q. Do you now know that that court decision had nothing to do with undocumented children?

A. The court decision evidently had nothing to do with undocumented children, but we did accept them as a result of that.

Q. Are you aware that the court decision involves solely documented children, children documented by the Immigration and Naturalization Service?

A. Yes, I am aware of that, but those documented children were frequently there on a six weeks' to two months' visitor's visa, and when that visa expired they were allowed to stay.

[page 38]

Q. Do you have any idea how large the State of Texas is?

A. Yes, I have.

I also have an idea of the proximity of the State of Texas and the ease of admission into the State of Texas compared to crossing anywhere from 10 to several hundred miles of open sea to get to the Virgin Islands.

[page 44]

I might also point out – this is really relative to one of the questions I was just asked, that the total population, English-speaking population, where we draw students in the Virgin Islands from the down islands is approximately three million compared with approximately 68 million population, say, in Mexico. So while we are smaller, what we are drawing from is much smaller, Texas is larger but the potential draw is much larger, also.

The movement of students into the Islands increased annually largely because it was a better school system. And people in the down islands, if they could give their children a better education – for the same reason I came here – were the same reasons they were sending them to the Virgin Islands for a better education for their children.

And I strongly suspect that we will have the same type influx here, so it wasn't a question of those that were here at the moment. It was opening the gate for many, many, many additionals coming in.

March 24, 1980
VOLUME XXVIII

TESTIMONY OF ESTEVAN FLORES

[page 99]

Q. Mr. Flores, would you please state your full name for the record and please spell it for the court reporter?

A. Yes. My name is Estevan Timothy Flores, E-s-t-e-v-a-n T-i-m-o-t-h-y F-l-o-r-e-s.

Q. And how are you currently employed?

A. I'm currently employed by the Department of Vehicle Sciences, Pan American University, Edinburg, Texas.

Q. What courses do you teach at the Pan American University?

A. I teach a course on the Mexican-American people, taught social problems, also teaching a course on the 1980 census, experimental internship program.

[page 100]

Q. (By Mr. Torres) Mr. Flores, did you co-author a field study of Mexican undocumented immigrants entitled "Social, Economic and Demographic Characteristics of Undocumented Mexicans in the Houston Labor Market, A Preliminary Report" dated March, 1980, and marked as Plaintiffs' Exhibit No. 207?

A. Yes, I did.

[page 104]

A. Yes. The preliminary report basically has two parts. The first part covers the sample of 138 in its entirety. The appendix, Pages 65 on is a separate analysis of the subsample, those 105 parents of the children.

Q. For the purpose of this suit, can you please give us your findings as to the 105 sample population derived from the parents of undocumented immigrant children not in public school?

A. Yes.

Q. According to you study, what is the average length of stay in the United States by parents of undocumented immigrant children?

A. Those in our sample, the average length of stay here in the U.S. is approximately 6.5 years.

Q. How does this result compare with other studies that you have seen?

A. Could you repear the question?

Q. My question is, according to your study, what is the average length of stay in the United States by parents of undocumented immigrant children? That is, what is the length of time, average length of time that they have been here in the United States?

A. That was 6.5 years.

[page 123]

Q. (By Ms. Dasher) While they are looking for those, I will ask you a general question.

I noticed in your study and in the report that you wrote, that you indicated that you found out that the employees, these undocumented workers, were begin treated very well by their employers in the main. Isn't that what you determined?

A. They stated that they were treated similar to other workers.

[page 127]

Q. If you will look at 024, no, 024 reports four children enrolled in the public schools of Mexico, and that this person wants to bring them up here to go to school. Is that accurate?

A. There are three or four different questions of children. What question are you referring to?

Q. Why don't you tell me which numbers deal with that.

A. If you are referring to Question 16, four Mexico and zero in the United States.

Q. Question 20?

A. Yes. What about it?

Q. Does that say what I said it said, which is that they wanted to bring their children up here to go to school?

A. Yes, that's correct.

Q. If you will look at 025, Page 4, Question No. 30, "Why did you leave your native country? Specify."

The answer, "To work, education for children, keep family together."

Is that accurate?

A. Yes. To work, education for children, keep family together.

Q. If you will look at 006 –

A. Can I go back to that one question? Did you want to know how we coded that?

Q. No. I wanted to know if it was accurate.

A. Okay.

Q. Would you look at question No. 50, Page 7?

A. Is this still on 25?

Q. This is 006.

A. I don't have it. The question number, please.

Q. Question 50, Page 7, indicates that the primary reason this person came to the United States was for school.

A. The first time that they came to the United States.

Q. And they have six children, looking at Page 1, Question 7A.

A. No. That's not correct.

Q. Well, how many children does this person have, Question No. 12?

A. Question No. 12 indicates that there are six children of the present marriage.

Q. So, there could be more?

A. Correct. That's why there is a Question 13 which asks of previous marriages.

Now, in terms of Question 17, which asks how many are living within the United States, the answer is five.

Q. So, there is still some in Mexico to bring over. Is that right?

A. Yes. No, that's not right. We have no indication that that's what is going to happen.

Q. You don't think the Mexican people would like to keep their families together?

A. Yes, they would.

[page 131]

Q. Let's assume that the ages of the children are school age, and there are some in Mexico, as id evidenced by the questionnaire where the gentleman says he has four children in Mexico in school that he wants to bring over here.

A. In the previous questionnaire, yes.

Q. And you don't think that suggests, along with your statement, that the Mexican people would like to keep their families together, that we would try and unify these two groups of families by bringing them to the United States?

A. We had a few of our respondents say that, yes. The majority did not say that.

Q. Did any of them say, "I will not bring my children to the United States to unite my family"?

A. No. We didn't ask that question.

Q. Then, it isn't really surprising that you wouldn't get an answer to it, is it?

March 25, 1980
VOLUME XXIX

TESTIMONY OF
MR. ALBERT CORTEZ

[page 13]

Q. Finally, I would just like to ask you about four or five questions on financing. Have you had an opportunity to read the testimony of Mr. Bynum from the Texas Education Agency, his testimony in this case.

A. Yes, sir, I have.

Q. Do you recall that Mr. Bynum estimates the cost of educating or do you recall he mentions the annual cost of $96 million throughout his testimony?

A. Yes, sir, I do.

Q. Are you award how he calculated the $96 million?

A. Yes, sir. He took an estimated state allocation of $800 per pupil, multiplied that by 120,000 children and came up with 96 million.

Q. So he was assuming an impact of 120,000 students?

A. Yes, sir, he was.

Q. Do you have an exhibit with you today – I believe it's Plaintiff's Exhibit 454 which discusses the projected surplus in the State of Texas for the end of this biennium?

A. Yes, sir.

Q. What is the comptroller of the State of Texas currently projecting as the surplus at the end of the current biennium?

A. He is projecting according to this document

[page 15]

Q. Have you attempted to calculate what the surplus would be in the State of Texas if there are only 60,000 undocumented children who would enroll and again utilizing Mr. Bynum's figures on the per pupil expenditure?

A. Yes, sir. Again, using Mr. Bynum's figures and the projected surplus I have come up with an estimate of 276 million still remaining in surplus.

Q. That 276 million which would still remain in the Texas surplus you simply calculated that figure by taking the figure of $800 per student, multiplying by 60,000 and then deducting from the comptroller's estimated surplus of 324 million?

A. Yes, sir. That's the process.

Q. Have you followed the same process to calculate what the State of Texas will have as a surplus assuming that there are only 20,000 undocumented children at the end of this biennium?

A. Yes, sir. Again, assuming the same process, if you take the 20,000 students, multiply by 800 per student you come up with a statewide cost of I believe it was $16 million. You subtract that from the 324 million projected surplus and you wind up with 308 million dollars still available.

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

JOINT APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

* * *

NO. 80-1538

* * *

JAMES PLYLER, Et Al.
V.
J. AND R. DOE, Et Al.

* * *

NO. 80-1934

* * *

STATE OF TEXAS, Et Al.
V.
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et.al.

VOLUME E

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WHO CARES? WHO COUNTS?
A NATIONAL STUDY OF MIGRANT STUDENTS' EDUCATIONAL NEEDS
1979

[page 68]

La Villa's Migrant Reading and Four-Year Old Programs utilized bilingual materials purchased with funding from other sources. La Villa teachers also have participated in staff development funded from other sources. However, little is pointed out in district aplications which addresses coordination of funding in the manner recommended in the national goal. (72)

Brownsville did develop and implement three components which built on cultural awareness. An art instructor was funded to help children gain insight into--and identify with--art, and address the cultural history of art. (73) The art classes were not attended by many students because of conflicts with the "block reading time" scheduled for two hours. (74) The Bilingual-Bicultural Music component, also implemented in the summer program, sought to develop oral language, motivation, and learning simultaneously through music dealing with the culture and lifestyles of other communities. (75) A locally-developed checklist was proposed to measure the acquisition of music skills, however this list was never completed. (76) Finally, the district addressed the migrant child's "cultural disadvantageness" as lack of educational travel and in order to enhance the child's classroom interaction scheduled field trips in the surrounding community. (77) Trips to the area mall, hospital, community play, zoo, McDonald's and Sambo's were taken. The objectives of the component called for affording the opportunity to expand their cultural background as evidenced by 11

field trips. (78) "Afford the opportunity" can be evaluated, as the district did, by taking a head count of the number of students taking trips.

EXCHANGE OF STUDENT DATA BASE (NATIONAL GOAL 7)

Another of the National Goals for Migrant Education calls for the development in "each program a component of intrastate and interstate communications for exchange of student records, methods, concepts and materials to assure that sequence and continuity will be an inherent part of the migrant child's total education program."

The MSRTS/Identification/Recruitment Component is required of all LEA applicants by the State Migrant Office. The state agency migrant application has established three major objectives, with timelines to be set by the district. The objectives are: (a) the transfer of eligibility forms for migrant students in the district to the Education Service Center terminal sites; (b) initial update of medical and instructional information to the terminal; and (c) all records for migrant students including update and withdrawal information sent to the terminal site at the end of the school year. (79)

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It is impossible to state objectively the number of migrant teachers which is adequate. One can not safely estimate an optimum teacher-student ratio. An adequate number of teachers in any given project must mean that there are enough teachers to deal with each individual migratory student both personally and educationally. The teacher must have time to listen, to evaluate, to inculcate concepts, and to prescribe activities to develop skills. Moreover, the teacher must have time to manage the classroom environment, to

keep the necessary records, and to report the progress of each migratory student periodically. Because all teachers have different talents and skills, the amount of time each teacher must have per student to do an effective teaching job varies.

Adequately trained teachers in content areas and methodologies are those teachers who can teach. They are competent. They demonstrate the abililty to manage the classroom environment and the instructional process so that the students learn, for without learning there is no teaching. Such adequacy can not be determined by the number of semesters or quarters one has attended an institution of higher education. Whether the teacher has developed competence through formal education or experience is unimportant. Hallmarks of such teachers are difficult to define, but easy to sense in personal contact. The competent teacher understands the materials to be taught rather than just being able to quote a book or parrot a professor on the subject. Principles are related to facts, details are related in consistent structures so the teacher does not spend inordinate amounts of time on unnecessary details or slight crucial facts. Teaching is an orderly process although many different approaches to the order necessary for structured learning environments are possible. The competent teacher uses methods that fit both the preferred teaching style and personality of the teacher and the preferred learning style and personality of the learner. For some teachers, the classroom will be a very ordered environment with rather strict rules; for others, the classroom will be rather informal and the casual observer may fail to perceive the underlying organization and governing principles. In all cases, the progress of the students in mastering concepts and skills will demonstrate the teacher's competence.

Since the migrant project should provide for varied methodologies, including some degree of individualization, elements of the self-paced approach, and tutoring, the teacher must be able to orchestrate all of these elements and bring them to bear on the education of students. This implies competence in management. It also requires that the teacher be able to demonstrate desired practices to and oversee the work of aides, parent or community volunteers, or students cooperating in the instructional process. The teacher is responsible for the evaluation of the students' educational needs and for the prescription of activities to meet those needs.

DEFENDANT'S EXHIBIT 5-2

[*HISD Administrative Procedures*, Revised July 28, 1975]

ARTICLE SEVEN
STUDENT PROCEDURES

700.000 ENROLLMENT—ADMISSION (Sec. 21.03 Texas Education Code)

700.100 Student's Legal Name for Enrollment

Parents or legal guardians shall enroll their child under the child's legal name. Parents of a student whose name on the enrollment card differs from the legal name should be advised that the school must enroll all students under legal names. A parent or legal guardian who requests the school to use a name other than the legal name for his child should be directed to institute legal proceeding to change the legal name. The parent or legal guardian who insists on enrolling a child under a name other than his/her legal name should be referred to

the Assistant Director of Attendance, located at Dow Elementary School.

701.000 Residence Requirements (State)

a. All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he/she resides or in which his parent, guardian, or the person having lawful control of him resides at the time he/she applies for admission.

b. A student desiring to enroll in school of the Houston Independent School District for the first time should apply for enrollment at the principal's office in the school zone in which the parent's reside. Principals should check the HISD street directory, furnished by the Pupil Transfer Department, to make certain the address given is the proper school attendance zone.

c. Residence for free school attendance purposes occurs when the following person(s) resides within the Houston Independent School District.

(1) Child.

(a) Full capacity to choose residence for school attendance purposes if 18 years of age.

(b) Very limited capacity to choose residence for school attendance purposes if under 18 years of age.

(2) Parent (natural or adopted) with whom child resides.

(3) Legal guardian (an order of a county or probate court is required) with whom child resides.

(4) Persons having legal control of the child for all purposes and not for the ostensible purpose of attending school. (See Section 701.130).

(5) International Teenage Exchange Students. (See Section 701.200).

d. Alien parents of a child who is a United States citizen by birth or naturalization, a resident alien, or otherwise legally a resident of the United States (but not including those in the United States on a visitor's permit) can establish residency for free school attendance purposes on the child's behalf under the provisions of paragraph c. of this section.

701.010 Compliance With Residence Requirements

Compliance with residence requirements shall be determined as follows:

a. Age, Grade and Residence (AGR) Card

A parent, guardian, person having lawful control of a student or a student over eighteen years of age shall complete the Age, Grade and Residence Card (AGR) which will reflect whether he/she resides in the District. If the information on the AGR Card establishes the required residency, no further inquiry regarding residence will be made by the principal or other school official.

b. Establishment of Qualifying Age

The principal must establish a qualifying age for eligibility to attend school as provided in Section 702.000.

c. Residence Ineligibility Discovered Before Enrollment

Any evidence or indication of a student's ineligibility for tuition-free school attendance shall be brought to the attention of the principal before enrollment, and the student shall not be enrolled. The principal shall refer the student and/or his or her parent, guardian or person having lawful control of the student to the Pupil Transfer Department who will attempt to ascertain if there is any possible way to legally enroll said child or will advise the parents or guardian of what steps should be taken in order to obtain eligibility for admission and enrollment.

d. Residence Ineligibililty Discovered After Enrollment

If an ineligible residency for school attendance purposes is brought to the attention of the principal after enrollment, the principle shall investigate to determine the validity of the claimed residence. Care should be taken to avoid placing the student, parent, guardian or person having lawful control of the student in an embarrassing position. If the investigation reveals an ineligible residence for school attendance purposes, the principal shall refer the student and his or her parent, guardian or person having lawful control of the student to the Pupil Transfer Department with a written statement of the reasons of ineligibility. If a question arises as to the immigration status of the student, his or her parent or guardian, the individual concerned shall be referred to the Houston Legal Foundation for counseling. The Pupil Transfer Department will assist with any case and if the facts warrant an extension of time for establishing child's eligibility, normally within two weeks, the Pupil Transfer Department will so advise the respective school. If an eligible residence has not been established within this time, the student shall be subject to the payment of full tuition as a condition of remaining in school.

e. Domicile Within the District for Assignment

This section in no way affects the assignment of a student to a particular school pursuant to the Amended Decree of September 18, 1970, and Section 710.000 *Board Policies and Administrative Procedures.*

710.100 Tuition

A pupil whose parent or guardian lives outside HISD is not eligible to attend a Houston public school unless one of the following has been processed.

DEFENDANT'S EXHIBIT 14-10

Texas Business Review, June 1978

[page 101]

COUNTING ILLEGAL MEXICAN ALIENS MYTHS AND MISCONCEPTIONS

Kenneth Roberts
Michael E. Conroy
Allan G. King
Jorge Rizo-Patron

The undocumented migration of foreign nationals to the United States has recently emerged as a serious national problem. Because the impact of illegal aliens on jobs and social services is related to the number of illegal aliens in this country, an accurate estimation of this number is particularly important. The impression conveyed by influential persons in the government and the media is that this number is so large—between six and eight million—that the time for study has long passed and that the present need is for immediate action.

In fact, serious flaws in the assumptions that underlie the prevailing estimate cause it to be highly unreliable. Not only does the estimate heavily overstate the stock of illegal aliens, it also implies a misconception of the migration process itself.

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DEMOGRAPHIC IMPLICATIONS OF THE LESKO ESTIMATES

Over 90 percent of apprehended Mexican illegal aliens are male and between the ages of 15 and 40. Survey studies by North and Houstoun and by Cornelius agree that undocumented flows consist largely of males who come from a small group of states in central Mexico. What emerges is the conclusion that six states—Guanajuato, Jalisco, Michoacan, San Luis Potosi, Zacatecas, and Chichuahua—contribute the great majority of undocumented Mexican workers.

Based on the 1970 Mexican census, the expected size of the 1975 cohort of males between the ages of 15 and 40 in these six states is 2,524,753. If we assume, conservatively, that only 50 percent of the Lesko estimate has come from these states, 40.5 percent (90 percent times 90 percent times 50 percent would be young males from these states. Thus, the Lesko estimate would imply 2.1 million males (40.5 percent times 5.2 million) from central Mexico and Chihuahua are presently residing in the United States. This represents four out of every five men from one of the most populous regions in Mexico! As a shortage of manpower of this magnitude could not escape the attention of observers, it must be concluded that the biases in the individual elements of the Lesko estimate have compounded one another to result in a number that fails to pass the most basic of empirical tests.

POLICY CONSIDERATIONS

The implications of our findings are dramatic. Instead of coming to the United States and never leaving, most Mexican aliens leave within the same year they come. Those who return to the United States the next

year and are apprehended increase the estimated Lesko inflow and those who escape apprehension are again assumed to become permanent residents. There is no more fundamental misconception in the Lesko report than the notion that the migration of Mexican illegal aliens is a permanent rather than a predominantly seasonal process. This misconception exaggerates the size and rate growth of the stock of undocumented Mexicans and leads to erroneous policy conclusions. If migration is temporary, what we see in apprehension data is not a set of permanent increases in the labor force equal to the total migrant inflow but rather a supply of labor that requires new jobs only to the extent of the increase in the size of the annual flow.

Moreover, legislation such as the Carter administration's Alien Adjustment Act, which would give immigrant status to persons who could prove residence since 1970 (though it might have been only seasonal), would not legitimize an existing situation. It would rather create a situation in which, through improper use of documents obtained during their residence, seasonal migrants could become permanent residents. Thus, by reflecting a false view of the migration process, the Carter bill could have the ironic effect of establishing a larger and more permanent illegal alien population than the United States presently contains.

DEFENDANT'S EXHIBIT 14-18

THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY

by

David S. North Marion F. Houstoun

This report was prepared for the Employment and

Training Administration (formerly the Manpower Administration), U.S. Department of Labor, under research and development contract no. 20-11-74-21. Since contractors conducting research and development projects under government sponsorship are encouraged to express their own judgment freely, this report does not necessarily represent the official opinion or policy of the Department of Labor. The contractor is solely responsible for the contents of this report.

Linton & Company, Inc.
Washington, D.C.

March, 1976

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Further, a California State Social Welfare Board Position Statement "Issue: Aliens in California" addressed this problem in general terms but reported no empirical research.

The interviews provide some data on the subject of illegals' participation in public programs. Questions were asked about relationships to tax, social servie, and income transfer programs. It should be noted, however, that the characteristics of the respondents, who were typically young male workers, are not those of a population likely to receive income transfer payments. The respondents reported the following levels of program participation:

Program Activity	Percentage of Respondent Participation
INPUT:	
Social Security Taxes withheld	77.3
Federal income taxes withheld	73.2
Hospitalization payments withheld	44.0
Filed U.S. income tax returns	31.5
OUTPUT:	
Used hospitals or clinics	27.4
Collected one or more weeks of unemployment insurance	3.9
Have children in U.S. schools	3.7
Participated in U.S.-funded job training programs	1.4
Secured food stamps	1.3
Secured welfare payments	0.5

A program-by program review of the respondents' participation in these 10 activities follows.

Social Security Taxes. The most common interaction of interviewed illegals with the U.S. government was, of course, their apprehension by INS at the time of the interview; the second most common dealt with Social Security taxes. More than three-quarters of those interviewed said that these taxes were withheld by their most recent employer.

Two aspects of these transactions should be borne in mind; first, this, the most regressive of federal taxes, carries with it no refund provisions; in 1975, both the employer and the worker made contributions of 5.75% on the first $14,000 of a worker's wages. Secondly, to collect the benefits from the program, an individual

usually has to work for a substantial period of time. It is doubtful that any but a small number of the respondents will be able to recapture any of their investment in this system.

There were variations in the extent to which different groups of respondents reported that social security taxes were withheld. Expectedly, a higher precentage of those with non-farm jobs reported such deductions, compared to those in agricultural employment (80.5% vs. 61.7%, respectively). Unexpectedly, there was a higher incidence of withholding reported in San Antonio (84.0%) than in New York (74.1%). The geographical area with the lowest rate reported was the border counties, where only 27.9% of the respondents reported such deductions. Of the Mexican respondents, 74.5% reported these taxes, compared to 79.7% of the WH illegals and 82.3% of the EH illegals.

Income Tax Withholding. There are circumstances, such as relatively low wage payments, in which an employer is obligated to pay social security taxes but not to deduct income taxes. This presumably explains the lower rate of income tax withholding, which was 73.2% for the interviewed apprehended illegals. The rate was higher among respondents in Los Angeles (83.5%) than in New York (77.1%), and considerably lower along the border (24.6%).

We also asked about social security and income tax deductions in the respondents' previous U.S. job; it is presumably a measure of their upward movement that the incidence of such payments was a little higher in their most recent job than in the previous one. In the case of income taxes, for instance, 64.5% of the respondents who had a previous job in the States reported that deductions were made in that job.

Hospitalization. Income and Social Security tax deductions are mandated by the government, and violations by employers are risky. On the other hand, while sometimes written into union-management contracts, there is no statutory obligation for employers to deduct hospitalization insurance from workers' wages, or to finance it directly.

DEFENDANT'S EXHIBIT 14-19

REPORT TO THE SENATE COMMITTEE ON THE BUDGET

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

IMPACT OF ILLEGAL ALIENS ON PUBLIC ASSISTANCE PROGRAMS: TOO LITTLE IS KNOWN

December 1, 1977

Appendix II
[page 3]

However, recent HEW-required quality control checks of 45,000 AFDC cases in nine States--including California and New York--identified only 14 recipients as illegal aliens--less than one-thirtieth of 1 percent of the sample. HEW cautioned that any projections based on such a small sample would be unreliable. Even allowing for unreliability due to small sample size, and failure to detect some false documents, these results suggest that use of the AFDC program by illegal aliens is not extensive.

Two other studies also contradict the assertion that illegal aliens are a heavy drain on public welfare. A major study prepared for the Department of Labor in 1976 (by North), using interviews of 793 apprehended illegal aliens at 19 locations throughout the country, found only 4 of the respondents, or one-half of 1 percent, who said that they had received welfare assistance. In North's use of the term "welfare," he included both AFDC and SSI, and did not obtain separate responses on illegal aliens' use of each.

Another study (by Cornelius, Massachusetts Institute of Technology) dealing with Mexican illegal aliens reported that only 2.2 percent of the 505 illegal aliens interviewed had received welfare payments. Cornelius' study also included both AFDC and SSI in the term "welfare," and it did not obtian separate responses on each.

In California, during the 1-year period through November 1976, 404,000 persons applied for AFDC benefits. Of these, 13,977 (3.5 percent) were foreign-born applicants who could not prove their lawful status in the United States. They were asked to appear at INS offices for interviews to determine their immigration status. Of those referred to INS, 10,404 were determined to be illegal aliens or failed to appear and were thus presumed to be illegal. They constituted 2.6 percent of all applicants during the year.

. . .

Welfare officials in New York State said they had not specifically studied the impact of illegal aliens on public assistance programs, but they believed the impact was insignificant. They cited statistics from a quality control review of 1,228 AFDC cases in which only 4 recipients (one-third of 1 percent) were found to be illegal aliens.

In New York City, INS is asked to verify the status of public assistance applicants who cannot provide documents proving citizenship or legal alien status. INS files in New York City contained a large backlog of unanswered requests for verification. The responsible INS official said the backlog was caused by a heavy workload and the low priority placed on such requests. As a practical matter, according to a city welfare representative, in the absence of a response from INS, the city accepts baptism certificates and voter registration cards as satisfying proof of citizenship. How many of these documents are fraudulent is uncertain.

We interviewed 120 apprehended illegal aliens in the Los Angeles-San Diego area, New York City, and Washington, D.C., and none of them said they had received AFDC benefits.

SSI: The SSI program provides cash assistance to blind, aged, or disabled people with limited income. Funded by the Federal Government and supplemented by some States, it is federally administered. Citizenship or permanent resident alien status is required for eligibility.

There has been little research on the impact of undocumented aliens on the SSI program. The reason for this may be the belief held by some that few illegal aliens receive SSI benefits because the age, work history, and other eligibility requirements are not consistant with the overall characteristics of the illegal alien. While this theory may be generally valid, the degree of validity will vary according to location. It is more likely to hold true in the California area, for example, than in the New York area. In California, illegal aliens are more likely to be young, single (or at least unaccompanied by dependents), able to work, and transient. In New York, they are more apt to be older and accompanied by dependents of all ages.

HEW officials in New York stated that from January 1974 through August 1977, the Social Security Administration investigated 18,300 cases in which there was a high degree of suspicion that an SSI recipient or applicant was not eligible for benefits. Of the suspect cases only 61 (one-third of 1 percent) involved illegal aliens.

In our June 11, 1976, report, "Problems in Administering Supplemental Security Income for the Aged, Blind, and Disabled" (MWD-76-73), we discussed the problem of payments to ineligible persons. We reported that in a random sample of 23,013 SSI cases for 7 months in 1974, HEW found that 6.1 percent of the cases involved payments to ineligibles. No record was made of the number of ineligibles who were illegal aliens, however.

In a recent letter to a Member of Congress, the Commissioner of the Social Security Administration wrote, "Undoubtedly, erroneous SSI benefits are paid to some illegal aliens who have successfully misrepresented their resident status***," but added that "we do not have data on erroneous payments made to illegal aliens."

None of the 120 illegal aliens we questioned said they had received SSI benefits.

FOOD STAMPS: Food Stamps is a federally funded program administered by States and localities. It enables low income families and individuals to buy coupons at a discount, then redeem the coupons for food purchases. Citizenship or status as a permanent resident alien is required for eligibility.

. . .

Officials of the Department of Agriculture's Food and Nutrition Service stated that less than 5 percent of the

households receiving food stamps are ineligible and that they believed very few of those ineligibles were illegal aliens. They were unable to provide data supporting their belief. However, they felt that the few illegal aliens who might be receiving food stamps were doing so with false documentation. They said that, to their knowledge, none of the Service's quality control reviews had identified any illegal aliens as recipients.

New York State officials also minimized illegal alien use of food stamps, and cited a recent quality control review of 1,187 food stamp households. Of the sample, 99 households were found to be ineligible, but only 1 of those (less than one-tenth of 1 percent of the sample) was an illegal alien household.

A San Diego County study on the impact of illegal aliens found that the county's procedures adequately screened them from the Food Stamp program, and thus concluded there was no cost impact on the program. The North report, done for the Department of Labor in 1976, indicated that 10 (1.3 percent) of 793 illegal aliens interviewed had received food stamps. Of the 120 illegal aliens interviewed had recieved food stamps. Of the 120 illegals we interviewed during this review, only 1 (less than 1 percent) stated he had received food stamps.

Various other food assistance programs do not specify citizenship requirements. Some are the School Breakfast Program, the National School Lunch Program, and the Special Milk Program for Children. Food and Nutrition Service officials were unable to provide information about illegal alien participation in any of these programs.

DEFENDANT'S EXHIBIT 14-25

AREA HANDBOOK FOR MEXICO

Prepared for The American University by
Johnson Research Associates

Research completed March 1969
First Edition Published 1970

[page 177]

Primary Education

Pre-primary is the lowest level of Mexican education. It is available on a limited basis for children from the ages of two through six. Pre-school education emphasizes early hygienic and emotional training via singing, dancing, games, and physical, artistic, and other activities. The two divisions of pre-primary education are *guarderias infantiles* (nursery school) for ages two through four, directed by the Ministry of Public Health and *jardines de ninÑos* for ages four through six, directed by the Ministry of Education.

At age six a child enters primary school which ideally lasts for 6 years. The primary school curriculum is comprehensive and stresses total personality development intellectually, socially, aesthetically, and physically. Facilities are classified according to whether they are urban, rural, boarding, or "123 schools." Urban and rural institutions are geared to their respective environments; boarding schools are for pupils living great distances from available day schools, and 123 institutions (named for the constitutional article creating them) are sponsored by large employers for their employees children.

The program for all primary schools is divided into three cycles of 2 years and the contents of the first cycle are enlarged and intensified in the succeeding cycles. The cycles attempt to give every child as much knowledge as possible during the first 2 years since the majority of pupils never reach the upper cycles. Students that do complete the sixth year are granted certificates allowing them to move up to the secondary level.

DEFENDANT'S EXHIBIT 16-4; PLAINTIFF'S EXHIBIT 436

THE IMMIGRANT WORKER: A SOCIAL PROBLEM OR A HUMAN RESOURCE

by Jorge A. Bustamante
El Colegio de Mexico

This paper was prepared for the Conference on Minorities and the Labor Market held at the Airport Marina Hotel, Los Angeles, California, April 1977, sponsored by the Chicano Studies Center UCLA.

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...rather, they are employed in a situation of illegality, tailor-made for powerful interest groups in the United States.

A case in point could be the famous Texas proviso introduced by Texas legislators to amend the current immigration law. In defining what should be understood by concealing, harboring or shielding the entrance of an alien into the United States, the law makes the following exception:

> Provided, however, that for the purposes of this section, employment, including the usual and

> normal practices incident to employment, shall not be deemed to constitute harboring (U.S. Congress 8 U.S.C., section 1324, 1952).

This is not to suggest that penalizing the employer of an undocumented immigrant would be a solution, as has been suggested by the supporters of the Rodino Bills. This is to illustrate some of the structural factors that have shaped the conditions under which the phenomenon of undocumented immigration takes place.

Consistent with one of the conclusive remarkes made by the Domestic Council Committee on Illegal Aliens, quoted at the beginning of this paper, other studies have pointed out the lack of empirical evidence in support of the contention that deportations of undocumented immigrants would result in job...

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Only 7.7 percent (509) had been paid in cash. Paid with check were 85.3 percent, and 6.3 percent were apprehended before they were able to collect their wages.

Of the check-paid workers, 74.4 percent (433) had tax deductions; 66.7 percent had social security deductions; 19.9 percent had no deductions and 6.2 percent did not answer the question.

One of the total sample, only 0.9 percent answered affirmatively to the question: Have you ever had children registered in U.S. schools? 2.4 percent did not answer the question and 96.6 percent answered negatively.

On the question: Have you ever been a recipient of welfare benefits in the United States? 3.2 percent answered affirmatively; 93.7 percent answered negatively and 1.7 percent did not answer the question.

On the question: Have you ever received free medical care in the United States? 7.8 percent responded affirmatively; 90.7 percent responded negatively and 1.9 percent did not answer the question.

Our findings are consistant with those of the North and Houstoun study (1976) which led the *Wall Street Journal* on June 18, 1976, to observe that the U.S. government is receiving more from the undocumented immigrants in the form of tax and social security deductions than what the immigrants are receiving in public services. North and Houstoun found that 77 percent of the Mexican undocumented immigrants of their sample have paid social security and 73 percent have paid federal income tax. Less than 4 percent had children in U.S. schools, and only half of 1 percent had received welfare benefits.

These findings are also consistent with another study. This on was conducted by Dr. Vic Villalpanado in San Diego county. From a review of 9,132 welfare recipient cases in the county, he found that only 10 were undocumented immigrants. Using the same techniques for a review of 14,000 welfare recipient cases in Los Angeles county, he found 56 undocumented immigrants. Out of these cases 54 were determined to have actually been eligible for welfare assistance according to current regulations (Villalpando 1976).

Oblivious of these findings, INS authorities were quoted by the *U.S. News & World Report* of January 26, 1976, making reference to a "tax burden of 13 billion dollars" attributed to the undocumented immigrants in the United States. The figure came from a study contracted by INS with a Washington based consultant firm, the Inner City Fund (ICF).

PLAINTIFF'S EXHIBIT 12

SIN PAPELES: THE UNDOCUMENTED IN TEXAS

January 1980

A report of the Texas Advisory Committee to the United States Commission on Civil Rights prepared for the information and consideration of the Commission. This report will be considered by the Commission, and the Commission will make public its reaction. In the meantime, the findings and recommendations of this report should not be attributed to the Commission but only to the Texas Advisory Committee.

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EXPLOITATION OF UNDOCUMENTED PEOPLE

> I think the alien smuggler today is no better than the old slave trader of a century ago. They have no regard for the persons....

Many witnesses at the Texas Advisory Committee open meeting gave examples of mistreatment of undocumented persons by the INS and described instances of abuse and exploitation by private individuals. Probably the most distressing included the virtual selling of aliens in black market-type operations. Hugh Williams, Chief Border Patrol Agent in Del Rio, testified that he knew of these operations and that there is currently a case pending in his area. While he declined to discuss the specific facts because the case was in litigation, he described generally how the procedures work. People are hired to locate undocumented workers in Mexico and are paid for each alien they recruit; it is a big business, he said.

> We had another case recently where we calculated the man had made ...$2,208,000 in 2 years smuggling people from El Salvador to Houston...He charged $1,500.

Once a group is formed, a driver is sent to pick them up and they are taken to a central location where they are literally sold as indentured servants to employers as far away as Illinois, North Carolina, Georgia, Missouri, and Mississippi. According to Agent Williams, the dealer collects a fee for each alien from the employer. The employer, he added, will work the alien until he has a return on his investment.

Smugglers were also accused by witnesses at the open meeting of exploiting undocumented aliens in other ways. Officer Glenn Parrot testified that in the first 6 months of 1978, a total of 281 smugglers were apprehended. The prices for smuggling aliens range from $450 to $1,500. Officer Parrot noted several cases of aliens being swindled out of their life savings. He described the traveling conditions that these people are made to endure:

> I have seen...men, women, and children and as many as 34 placed in the back of a U-Haul truck without any proper ventilation and travel miles and miles in that condition in January when it is cold. And those children were about to die. There is no ventilation, no heat, and no food, no toilet facilities.

These individuals also bear another burden if their smuggler is apprehended. Because of the need to secure evidence against the smuggler, many are detained as material witnesses in county jails. At this point they are detained as Federal court witnesses and are no longer under INS jurisdiction. Most smugglers post

bond and are released, while the undocumented aliens remain in county jails. These people are often housed under extremely bad conditions. A description of one such facility in Webb County was presented to the Texas Advisory Committee by Lee Teran, an attorney with the Laredo Legal Aid Society. She observed that she had participated in a suit involving this jail and knew from her own experience that "the conditions were horrendous." Most of the aliens were kept in three large cells with no place to sleep, no mattresses, toilets, or functioning showers; Ms. Teran did indicate that these conditions had improved somewhat.

According to testimony undocumented persons also suffer at the hands of employers who hire them knowing full well they are in this country illegally and who use that fact to take advantage of them. An INS agent told the Advisory Committee about trying to collect wages for aliens after they were apprehended:

> They pay them in cash....There have been some instances where a farmer would make a check, let's say for $300, make the alien sign [endorse] it. He pays him $25 and sets him on his way....So actually, he [the farmer] made a profit of $275 for his income tax.

In another instancae, an alien had worked from 10 a.m. to 2 p.m. and was paid $1. A witness at the open meeting alleged that some larger ranches have company stores where all items are sold at twice what they cost elsewhere and virtually everything that the workers buy is taken from their wages.

Frank Cortez, a well-known local radio personality, testified that he knew of cases where undocumented aliens had suffered at the hands of ranchers. He explained that aliens will endure a lot because they are

grateful to the employer for giving them a job. One example of this, Mr. Cortez noted, involved a young man who was involved in an accident on a ranch and lost both arms and an ear. Mr. Cortez told the Advisory Committee:

> This is what I call abuse. But, of course, he [the alien] stated that he had a good employer and he was grateful to the employer because he had a job and it was his misfortune that he lost both of his arms and he was lucky to be alive.

CONCLUSIONS

Undocumented persons are in the extremely precarious position of being unable to assert themselves in protection of their rights without subjecting themselves to possible deportation or prosecution. In the context of their relationship with authorities such as the INS, this means that when abused, they usually stand silent. The testimony given to the Texas Advisory Committee established that there are procedures used by the INS, such as interrogating aliens in closed rooms, which clearly lend themselves to abuse. The INS relies largely on its officers to report abusive actions by their fellow officers. The evidence presented at the open meeting demonstrated that this policy of self-policing has serious drawbacks and may achieve little, if any, deterrence. In fact, credible testimony indicated that some supervisory officials might encourage abusive acts by criticizing officers for not being tough enough on aliens.

Just as the liens are in a precarious position with regard to the authorities, they are also at a disadvantage with their employers. The evidence at the open meeting pointed to instances where undocumented people are shortchanged in their wages, overcharged at company stores, and made to work long hours under adverse conditions.

3. Economic betterment or survival is the reason most frequently given by undocumented persons for coming to this country; there has been no exception to this finding in any of the literature.
4. Undocumented persons are usually employed in low-status, low-skilled, and low-paid jobs.
5. Undocumented workers contribute more in the way of taxes than they receive in social services.
6. Undocumented persons send a significant portion of their income back to their native country to help support their families or relatives.

In the study prepared jointly by Avante Systems, Inc., and Cultural Research Associates for the Texas Advisory Committee, the above findings were, for the most part, confirmed. The study, "A Survey of the Undocumented Population in Two Border Areas," focused geographically on areas where large numbers of undocumented persons were examined, those in detention awaiting their return to Mexico and those unapprehended. Using these two populations, it was possible to contrast the characteristics and attitudes of undocumented persons who were being detained by the INS and those who were unapprehended.

Two areas of the border region were selected for intensive study—El Paso and the Edinburg—McAllen area located in the Lower Rio Grande Valley. In each of these areas, 300 undocumented persons were interviewed. Each sample was further broken down into three target groups of 100 persons each. The first target group—detained persons awaiting departure—as interviewed in INS Border Patrol detention and processing centers at Los Fresnos and El Paso. The second target group consisted of undocumented persons contacted through a bariety of public and private agencies in each of the areas surveyed of residential areas known to have

concentrations of undocumented persons. Persons in public places were also approached and interviewed in private. In addition, business firms known to favor and hire undocumented workers were surveyed.

Some of the key findings arising out of these 600 interviews with undocumented persons are as follows:

A demographic profile of the cumulative sample (n=600) suggests that respondents range in age from 20 to 30 years old. Most were single males. Less than half were married and less than 40 percent had children. Most of the respondents had been in the United States less than 5 years.

Virtually all of the respondents were from Mexico. Only about 2 percent came from other countries in Central America. Sixty-five percent of the El Paso respondents (n=300) were born and grew up in the State of Chihuahua; 5 percent were born and raised in Zacatecas. One-third of the Edinburg-McAllen sample (n=300) were raised in Mexican border states.

Almost half of the El Paso sample arrived in the United States before 1972; 17 percent arrived in 1978. The median number of years respondents have lived in the United States 5 years or less. Nearly half (48.3 percent) have lived in the United States less than 1 year.

Of the El Paso respondents 55 percent planned to stay in the United States permanently, while the rest indicated a desire to return home. Of those individuals planning to stay, the majority (91.0percent) indicated they would try to abtain legal residence in the United States. In contrast, only about 38 percent of the Edinburg-McAllen sample planned to remain in this country. The rest planned to stay less than 1 year.

With respect to the economic impact of undocumented persons, the interviews revealed the following:

Of the El Paso respondents, 73 percent stated that their primary reason for entering the United States was to seek work. Approximately 57 percent (56.7 percent) of the Edinburg-McAllen sample indicated this as their primary reason for coming.

PLAINTIFF'S EXHIBIT 25

NATIONAL SURVEY ON OUTMIGRATION IN MEXICO DESCRIPTION AND PRELIMINARY FINDINGS

Jorge A. Bustamante
El Colagio de Mexico

Paper prepared for the Simposium on Structural Factors Contributing to Current Patterns of Migration in Mexico and the Caribean basin, Brookings Institution on June 28-30, 1978.

[page 12]

The November border study shows that only 13.7% (n3689) of the migrants interviewed with the questionaire stayed in the United States during all of 1977. This finding tend to confirm the temporary nature of the Mexican immigration on which Cornelius and I with independent studies have both been insisting upon. This finding is congruent with that of the next row of table 1, with reference to job experience in the United States. Out of 3689 respondents 59% had a job in the United State during 1977 but few remained in the country for the whole year. We ought to further specify these data to know wither migrants quit their jobs because they want to go home or because of INS's interruptions or

because of the nature of the job they take. At any rate, my hypothesis continues to be that it is rational for the Mexican migrant that comes to the United States to keep his residence, home, and family in Mexico. In the United States he will have no other than a dead-end type of a job. Due to this structural factor he will not have any upward social mobility in the context of the United States society.

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LENGTH OF STAY IN THE U.S. BY MONETARY REMITANCE

Table 4 confirms what was said above about the need of being cautious in referring to the undocumented immigrants' contribution to the Mexican balance of payments. Out of the total number of respondents to "boletas" (9992), 60.1% fof them did not send money to Mexico. The question here is: what is the balance when the cost of outmigration payed with Mexican pesos is deducted from the amount of remitances?

More than likely the balance will prove to be favorable for Mexico. A question still remains: who is paying the costs of outmigration in Mexico and who is receiving the benefits?

The columns of "amount of dollars" sent to Mexico suggest another hypothesis: the longer the stay in the United States the greater the remitances to Mexico. Data shown in table 1 in combination with these figures of table 4 suggest that outmigration to the United States is advantageous for only a small percentage of all undocumented immigrants. The rest are those who lose and those who just survive with no progress made.

These data of table 4 also reinforce the thesis of temporary nature of undocumented residence in the United States.

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This seems to be reinforced by the data on those who did send money to Mexico (38.6% of n3689). Here we find that in deed rural immigrants tend to send more money than urban residents. Only 5.4% of the total 3689 however, were able to send more than $1,000 dollars during 1977. This is barely the per capita income in Mexico. These figures add force to my earlier comment on the small percentage of undocumented migrants who "make it" in the U.S. with higher income than the per capita income of Mexico.

Findings on region 2 (Jalisco, Michoacan, Guanajuato, Colima, parts of the State of Mexico and parts of Guerrero) in table 5 might have relevance to the findings reported by Dr. Cornelius in his study of several villages in "los altos de Jalisco" region, with regard to monetary remittances. Our data from the November border study shows in this table that migrants from region 2 had the highest percentages in the category of highest monetary remittances.

PLAINTIFF'S EXHIBIT 185

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

J. and R. DOE et al
vs.
JAMES PLYLER et al

Civile Action No. TY-77-261-CA

RECORDS OF PROCEEDINGS
ORAL HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Heard at: Tyler, Texas
On: September 9, 1977

[page 95]

A. Yes.

THE COURT: What kind of work do you do?

THE WITNESS: Whatever they want me to do.

THE COURT: What has he done in the past?

THE WITNESS: At the church or school.

THE COURT: What type of work?

MS. RODKIN: Are you asking what type of work at the church or at the school?

THE COURT: Yes, what type of work at the church and what type of work at the school?

THE WITNESS: Right now I haven't done any, because they just entered school last Wednesday, or day before yesterday.

Q. If there were no tuition payments in the Tyler schools, would you send your children back to the Tyler Public Schools?

A. Yes.

Q. Do you have four children in the Catholic school and one child still in the public schools. Is that right?

A. Yes.

Q. Can you afford to pay either $4,000.00 or $5,000.00 per year to have your children attend the Tyler schools?

A. No.

PLAINTIFF'S EXHIBIT 186

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

J. and R. DOE et al
vs.
JAMES PLYLER et al

Civil Action No. TY-77-261-CA

RECORD OF PROCEEDINGS

HEARD AT: Tyler, Texas
ON: December 12 and 16, 1977

[page 42]

Q. Have you seen any immigration figures, or have you in your reading come across any immigration figures of illegal aliens strictly for the State of Texas?

A. Yes, I had occasion to see them in the I.N.S. annual reports, an official tabulation for I.N.S., in terms of illegal aliens that have been apprehended. Now, this is only one aspect of the total alien population of the United States, which does not include all persons, for obvious reasons.

Q. Your figures are illegal aliens apprehended in the State of Texas?

A. These are the figures that I have seen.

Q. Approximately what are those figures?

A. I cannot remember.

Q. Do you remember if they are over a hundred thousand?

A. O.K., the last figure that I heard thrown out for 1975, there were--and I'm just doing this by recall now--there were something like seven hundred sixty-six thousand illegal aliens apprehended and sent back. Out of that eighty-eight percent or close to that were Mexican illegal aliens. Yet, within that category of Mexican illegal aliens, a high proportion of them were border runners, people who were caught within a forty-eight...

PLAINTIFF'S EXHIBIT 205

THE ECONOMIC IMPACT OF UNDOCUMENTED IMMIGRANTS ON PUBLIC HEALTH SERVICES IN ORANGE COUNTY

Final Report
presented to the
BOARD OF SUPERVISORS
COUNTY OF ORANGE CALIFORNIA

by the:
TASK FORCE ON MEDICAL CARE FOR ILLEGAL ALIENS.

[page 17]

SOCIAL SERVICE UTILIZATION AND TAX PAYMENTS

All the surveys found a very low tate of utilization of public social services by undocumented immigrants. The percentage of those who had secured public welfare payments ranged from less than 1% to 4%, depending on the study. The Orange County survey indicated that 2.8% had collected public welfare payments. Regarding food stamps, the Linton Corporation study showed that 1.3% had reported receiving them, while the Orange County study found 1.6%.

The Linton Corporation study found that 27.4% reported using a public of private hospital or clinic, while Orange County's sample showed 28%. The Orange county study showed that 15% reported using the Community Clinic of Orange County and 5.6% indicated that they had used the UCI Medical Center.

Of those who used a public or private hospital or clinic, 59% stated that they had paid the bill either directly or by insurance, while 8% reported paying the bill by "credit," and 2% reported using Medi-Cal. Of those who stated that they had used a medical facility, 30% either reported that they had not paid the bill or did not answer this question. The Linton Corporation, Bustamante, and Cornelius studies indicated that only about "8-10% of their respondents had ever received free medical assistance in a U.S. hospital or clinic." (Cornelius, p. 12) If we assume that 32% of those who indicated in the Orange County study that they had used a U.S. hospital or clinic had received free medical services (including in this category those who had received Medi-Cal and those who reported either they did not pay the bill or did not answer the question), it would mean that some 9% of the total sample indicated that they had received free medical services. This coincides with the 8-10% figure found in the other studies.

Both the Orange County and the Linton corporation studies asked respondents if they had hospitalization insurance deducted from their wages. Both found that a higher percentage claimed to have hospitalization insurance deducted than those who reported using a public or private hospital or clinic. The Linton Corporation study found that 44% had these insurance deductions, while in Orange County 34% reported this deduction.

All field research has found that the typical undocumented immigrant has payroll taxes taken from his/her wages. This finding is not surprising. Employers are not violating the law in hiring undocumented immigrants. But they would risk legal sanction if they did not deduct and pay legally mandated taxes.

As a crosscheck on the percentages of those who reported paying into the various tax systems, all but one of the studies asked the respondents whether they paid in cash, check, or by other means. The Orange County studyt also included this question. It was assumed by all the researchers that wages paid by check were very likely to hav ehad the mandated taxes deducted. Significantly, in each study the percentage of those who reported having the various payroll taxes taken from their wages was lower than the percentage of those reporting being paid by check.

PERCENTAGE REPORTING WAGES
PAID BY CHECK

Linton Corporation Study	78%
Bustamante	85%
San Diego	82% including 7% who were paid by a combination of check and room and board.
Orange County Study	90%

PLAINTIFF'S EXHIBIT 207

SOCIAL, ECONOMIC AND DEMOGRAPHIC CHARACTERISTICS OF UNDOCUMENTED MEXICANS IN THE HOUSTON LABOR MARKET:
A Preliminary Report

Submitted To:

Gulf Coast Legal foundation
2601 Main
Houston, Texas
77002

by

Gilbert Cardenas, Ph. D.
Sociology
University of Texas at Austin

Estevan T. Flores, M.A., A.B.D.
Behavioral Sciences
Pan American University
Edinburg, Texas

INCOME CHARACTERISTICS

In terms of the per hour earnings, the mean hourly rate for parents of undocumented children currently employed is $4,17. These per hour earnings for the Houston undocumented immigrants are relatively high. The Avante study found that: "The mean hourly earnings for respondents was $2.75...(Avante, 1978:25)." The persons in our sample have been employed, as stated earlier, for relatively long periods of time in an industrial urban setting with typically higher wages than in most other parts of Texas.

We gathered data in our study on total family income. The total family income indicated all earnings from family members. The range varies from 0 income to a high of $2,000 per month. The distribution is bi-modal. Twenty-six percent (26.0% of families earn between $400-599 and 26% earn between $800-999 per month. Twenty-eight pint eight percent (28.8%) of the families per month incomes are over $1,000. In yearly terms almost one-third (30%) of the respondents would earn incomes over $12,000. We must keep in mind, however, that the average number of persons currently supported is 5.5. The median income for families is $800 per month while the mean family per month income is $791.00. The median family income of $800 per month would mean a yearly family median income of $9,600. The Los Angeles labor market study found that the One-Stop clients median family income was between $4,000 and $6,000 which they thought to be low, especially for a married population in their peak years of earning (cf. Van Arsdol et al, 1979:83). Our family median levels indicate earnings more in line with expected earning of persons in their most productive years in the labor force in an economy rapidly expanding.

DEDUCTIONS FROM WAGES

As indicated earlier in this report, studies of both apprehended and unapprehended undocumented immigrants show that immigrants earning wages are often deducted from their wages the customary items as national citizens (cf. Avante Systems Inc. 1978:31-24; Orange County...1978:10,17-25; Bustamante, 1976a; and North and Houstoun, 1976:A-3). Our research on the parents of undocumented immigrant children substantiates these findings.

Over three-fourths indicated that income taxes were being deducted from their wages (N=45 or 77.6%).

Table 10A here

Eighty-three percent of respondents were deducted social security from their wages and finally, employers deducted hospital insurance from 44.6% of employed respondents. Thes percentages are in line with North and Houstoun's (1976) study of apprehended immigrnts and also Bustamante's study (1976a) of returned undocumented immigrants. Our figures are similar to the studies cited.

PAYMENT OF INCOME TAXES

There is very little data on the numbers or percentages of undocumented who have filed income taxes. The Avante researchers report that in their sample almost twenty percent filed income tax returns (cf. Avante Systems, 1978:41). In our sample of parents of undocumented children, 47.1% of respondents (N=48 stated that they had filed income taxes. The balance had not.

We also asked the respondents to indicate the number of times that they had filed income tax reports.

Both the preliminary report and this smaller sample of parents of undocumented children indicated a modal response of 3 times (or for three years), while the average mean

-Table 11A here-

response was 5 times filed. Seventy-one percent of respondents who have ever filed income tax have filed three or more times. Of those respondents who have been filing income taxes, a substantial number or approximately 28.9% have filed once or twice.

UTILIZATION OF PUBLIC AND PRIVATE SOCIAL SERVICES

We specifically asked the parents in our subsample if they were receiving 'asistencia publica', that is, welfare. Not one of 102 (0.0%) said that he/she or a household member currently receiving such assistance. Only 1% of parents said they or a household member was currently receiving social security benefits.

-Table 22A here-

The Avante researchers (1978) found that less than one percent of their sample was receiving Aid to Families with Dependent Children (cf. Avante, 1978:41). We too encountered similar findings. In our sample, as seen on Table 221, one percent stated that they or a household member was currently receiving AFDC. No one in our sample was receiving unemployment compensation. The zero percentage encountered in our sample reflects the high percentage of males employed (93.9%) and the substantial percent of women in the labor force (37.1%).

No one in this subsample said that they were receiving Catholic Charities, a finding dissimilar to the Avante

findings. The fifteen percent figure in Avante was biased, as noted by Avante researchers, since interviews were conducted via these agencies.

Only one person in our subsample answered affirmatively to a question on utilization of Migrant Health Services. Obviously, in Houston we would not expect to find such utilization where the undocumented immigrants are found primarily in manufacturing, construction and the services sectors (cf. pages 67-69).

The findings of this preliminary report then are in line with all previous research on utilization of governmental funded social services. That is, very few undocumented immigrants and in most cases less than 5-10% of this population utilize social services which are federally funded. An imbalance between social services used and contributions to federal tax bases thus arises. The media often fails to recognize this imbalance.

In addition undocumented immigrants are also stimulating the local economies where they reside through consumption (increased demand). These immigrants work, pay taxes through wage-deductions, buy and consume while hardly ever utilizing social services they have more than likely paid into.

RESIDENCY INTENTIONS

An important variable regarding undocumented immigrants is their intention to stay in the United States. North and Houstoun in their research asked of those immigrants who were to be deported or leave voluntarily if they planned to come back. Over 60% (of 685) responded affirmatively to this question (cf. North and Houston, 1976:94). The Avante researchers found that 55% of the El Paso sample and 37.7% of the McAllen sample planned to stay in the U.S. (cf. Avante, 1978:31).

In our study we asked the undocumented immigrants if they planned to return to Mexico. Only 12.5% responded affirmatively to this question while 85.6% said no and 1.9% were unsure or didn't know. Our subsample clearly intends to remain in the U.S. A follow-up question asked the immigrants (who said they would not return to Mexico) why they would not return. Forty-three percent (43%) responded that they have what they want here in the U.S. Another 32.1% said that they would be unable to earn a living back in Mexico.

Table 23A

PATENTS OF UNDOCUMENTED CHILDREN PLANNING TO RETURN TO MEXICO

	N	%
Yes	13	12.5
No	89	85.6
Don't Know	2	1.9
	104*	100.0

*1 missing case

Table 24A

RATIONALE OF PARENTS FOR NOT RETURNING TO MEXICO

Unable to earn a living	17	32.1
Have what we want here	23	43.4
To visit only	1	1.9
Other	12	22.6
	53*	100.0

*36 missing cases

The "other" category remains to be disaggregated by type. North and Houston found that of the Mexican apprehended undocumented immigrants: "80.6% of the Mexican illegals who said they wanted to return reported that they wanted to come back in order to get a job...illegals working in the Southwest were even more likely to report that they wanted to come back because they wanted a job (83.2%)...(North and Houston, 1976:94)."

We also asked the parents how long they planned to stay in the U.S. Almost two-thirds said they would stay permanantly (N=63; 65.6%), while another 26% would stay as long as possible for a sum of 91.6% who plan to remain indefinately. No one of the parents of the children indicated they would stay in the U.S. if schooling were available for their children.

Table 25A

INTENDED LENGTH OF STAY IN U.S.
OF PARENTS OF UNDOCUMENTED CHILDREN

Permanently	63	65.6
As long as possible	25	26.0
If schooling available for children	0	0.0
Less than one year	0	0.0
Don't know	0	0.0
Other	8	8.3

Almost all of the undocumented immigrants in our sample plan to establich permanent residency in the U.S.--94.8% or 92 parents. The balance do not. Of El Paso respondents in the Avante survey who planned to stay in the U.S., 91% plan to try to obtain legal residency in the United States while 38.3% of respondents in the Edinburg/McAllen sample plan to obtain such status.

Over 90% (N=72; 92.3%) of our respondents plan to naturalize. We can conclude then that the respondents in our subsample plan to stay in the U.S. as long as they can (permanently), and either plan to establish permanent residency or plan to naturalize.

PLAINFIFF'S EXHIBIT 209

MEXICAN MIGRATION TO THE UNITED STATES: CAUSES, CONSEQUENCES, AND U.S. RESPONSES

Wayne A. Cornelius
Massachusetts Institute of Technology

Prepared for the Brookings Institution-El Colegio de Mexico Symposium on Structural Factors Contributing to Current Patterns of Migration in Mexico and the Caribbean Basin, June 28-30, 1978, Washington, D.C.

[page 14]

These major waves of migration tend to obscure the fact that there has been a continuous flow of migrants from Mexico's densely-populated central plateau region to the United States since the 1880's. Improvements in transportation within Mexico played a crucial role in inititating the flow (Clark, 1908; Taylor, 1933:34; Craig, 1978:108, 208—209): regular passenger sevice on the railroad line connecting Mexico City to El Paso, Texas, began in 1884. Indeed, the railroads served not only as the mode of transport by the principal source of employment for Mexican migrants to the U.S. in the late 19th and early 20th centuries. Often recruited in Mexico by U.S. railroad agents, they worked on railroad construction crews in the Southwest and on track maintenance crews from Oregon to Texas and from California to Kansas and Illinois. By 1090, Mexicans comprised more

than 17% of the total maintenance force on the nine most important western U.S. railroads (Reisler, 1976:18). The now large Mexican communities in such midwestern cities as Chicago, Detroit, Gary(Indiana), and Kansas City began to form during this period, as migrants left the railroad track crews to seek employment in industry and the stockyards.

Changes also had a profound impact on Mexican migration. The expansion of the transportation network and the introduction of intensive irrigated agriculture in the U.S. Southwest created a heavy demand for uskilled labor. Passage of the Chinese Exclusion Act of 1882 had created a shortage of Chinese coolie labor, and Mexican workers became essential to the rapid expansion of southwestern agriculture. They worked at clearing the land of underbrush to permit cultivation, harvesting cotton, fruits, and vegetables, tending livestock, and in the mines (Reisler, 1976: 3-17). Even then, the wages being offered for railroad and agricultural work in the U.S. (about $1.00 to $1.25 per day) were princely by Mexican standards.

In 1910 the Mexican Revolution erupted, and during the decade which followed large numbers of Mexican migrated to the U.S. to escape the widespread violence, disruption of food supplies, high inflation, and lack of employment resulting from the Revolution. The geographic mobility of the rural Mexican labor force was also increased during this period by the destruction of the traditional hacienda debt-peonage system in many parts of the country. For the fist--and probably the last--time in U.S. history, tens of thousands of Mexicans were readily admitted to the United States during the 1911-1915 period as economic refugees, whom the Commissioner General of Immigration chose to define persons suffering from "industrial depression and its attendant evils" (Commissioner General of Immigration, 1916:397).

These "push" factors on the Mexican side of the border interacted with a new set of "pull" factors in the U.S.: The demand for Mexican farm workers in many parts of the South and Southwest was increased by depletion of the former labor supply--poor white and black laborers, who had begun their own migrations northward to such cities as Chicago, Detroit, and New York seeking better-paid jobs, and European immigrants, whose entry into the U.S. was curtailed by World War I and the restrictive U.S. Immigration Act of 1917 (from which Mexicans had been exempted). The U.S. entry into World War I only served to intensify the labor shortages in the Southwest and northern industrial areas.

World War I was followed by an economic recession, and with it the first of the mass "repatriation" campaigns aimed primarily against Mexican migrants. Urged on by labor leaders and politicians, mobs of native-born Americans in Texas, Oaklahoma, and other states launched attacks on Mexicans in their work places; vigilante groups terrorized them in their homes and destroyed their property. During 1920 and 1921, nearly 100,000 Mexicans left the U.S. under varying degrees of coercion (Cardoso, 1977).

The late 1920s brought a new wave of Mexican migrants from the central plateau region (Jalisco, Michoacan, Guanajuato, Zacatecas, parts of other states), which had been spared the worst ravages of the revolutionary conflict of 1910-1917 (see Craig, 1978: Chap. 3). A long-intensifying conflict between the Catholic Church and the Mexican government erupted into an armed insurrection known as the Cristero rebellion. Concentrated primarily in the central plateau region, the rebellion had highly disruptive effects upon it from 1926 to 1929 (and in some parts well into the 1930s), forcing thousands of workers northward to the United States (see Taylor, 1933: 36-40). Also, in 1927, a railroad linking Guadalajara with Nogales, Arizona, was

completed, stimulating a new flow of migrants from the central plateau region to California and Arizona.

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The migrants' expressed preferences correspond closely with their actual patterns of behavior. Among the most recent group of illegal migrants in my sample, the median length of stay during their last trip to the U.S. was 5.5 months. Not surprisingly, those who held non-seasonal jobs in commerce, services, and industry tended to remain for longer periods than those employed as seasonal agricultural loborers; but even among the non-agricultural workers, the average length of stay was well under one year.

The weight of the evidence clearly indicates that the majority of Mexicans who now migrate to the U.S. illegally do not aspire to permanent integration into U.S. society. What most of them seek is occasional, short-term access to income-earning opportunities in the U.S. Zarrugh reports that even those migrants from on village in the Mexican central plateau region who have been living in California for 10 years or more continue to regard themselbes merely as sojourners, intending to return to Mexico to retire. And she notes that for some this is not just an idle dream: "a substantial number" of elderly migrants have actually returned to their home village to live (Zarrugh, 1974: 177, 208). None of the more than 200 U.S.-based migrants included in Zarrugh's study had even applied for U.S. citizenship; most cited their probable return to Mexico as the principle reason for declining to become naturalized (1974:80).

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These and other kinds of jobs often held by Mexican illegals have several characteristics in common. They require little or no technical skill and only a rudimentary

command of English, if any at all. They involve dirty, often physically arduous tasks, wages at or slightly above the legal minimum, low social status, low job security (often due to the short-term or seasonal nature of the work), and little chance for advancement. In short, they are menial, unstable, dead-end jobs, which are nevertheless attractive to the migrant by comparison with the alternatives in his home community. When the Mexican illegals employed in these kinds of urban jobs are combined with those still working in stoop agriculture labor, it becomes apparent that very few are occupying what might be considered "choice" blue-collar jobs.

Michael Piore and other economists have noted that all industrialized economies generate a certain number of low-skill, low-wage, low-status jobs, which nationals of these countries tend to either reject out of hand or accept only under conditions of extreme economic hardship (Piore, 1976, 1977b). In the United States, the number of such jobs (outside of the agricultural sector) has not declined appreciably in recent decades (see Stewart, 1974: 116—118; Wool & Philips, 1975). Mexicans are only the most recent migrant group to fill them; their redecessors in this so-called "secondary labor market" have included immigrants from southern and eastern Europe, Chinese, Japanese, and Filipinos, and U.S.-born blacks from the rural south.

Several questions immediately occur: Why do jobs of this type continue to exist, in the midst of an advanced industrial society? Why are they shunned by native-born Americans? If Mexicans and other foreign migrant workers were not available to fill them, would the jobs continue to exist? If not, what purpose is served by restrictive measures which would attempt to block the access of the foreign migrant to these jobs? Advocates of a restrictive immigration policy have quick and simple--perhaps excessively simple--answers

to all these questions: The jobs exist because employers, benefiting from an abundant supply of cheap migrant labor, have had little incentive to structure their operations in an efficient manner; simply by "rationalizing the productive process" they could greatly reduce their needs for uskilled labor. The jobs are unattractive to native Americans because employers have diabolically "structured jobs that are so demeaning that only the frightened and desperately poor undocumented worker will take them" (Marshall, 1978b:5). Above all, the highly exploitative wage scales for these jobs repel unemployed American workers; almost any kind of job can be filled if the wage is high enough. Some jobs undoubtedly would be eliminated by employers if migrants were not available to fill them, but most of these jobs are not worth preserving anyway; the American economy and society should not be "subsidizing" marginal, inefficient operations by allowing them unresticted access to foreign migrant labor.

Few restrictions still cling to the earlier, simplistic notion of direct, one-to-one job displacement of domestic workers by illegal migrants which was popularized a few years ago by INS Commissioner Leonard Chapman ("give me a thousand more [Border Patrol] men, and I'll liberate a million jobs for U.S. citizens..."). The more recent, more sophisticated vesion of the argument holds that, while illegal migrants probably do not displace American workers directly, they do so indirectly, by depressing wages and working conditions in those sectors of the labor markey where they cluster:

> "The presence of illegal aliens in the labor market—desperate for work of any kind—undermines the very structure of the labor market....in two ways, by their numbers, and if you will, by their manners....Common sense suggests, all else being equal, that wages will remain stationary or fall if there are substan-

> tially more workers than jobs. And then there is the matter of the manners—illegal aliens are, in many circumstances, a *preferred* work force; they are dcile, because they are desperate; they work 'hard and scared,' to quote Ray Marshall. Thus the principal impact of illegal aliens on the labor market is....the creation of the self-fulfilling prophecy that illegals take jobs which legal workers will not accept. Were these jobs to be forced up to competitive standards, some of course would simply disappear, as employers either went out of business or reorganized their activities around the concept of high priced labor [i.e., they would mechanize]; others would become attractive to legal workers. In short, either directly or more often indirectly, illegal aliens are decreasing job opportunities for legal workers." (North, 1977: 5-6).

Does illegal migration "create unemployment" among the U.S. domestic work force? While restrictionists seem to feel that the drawing of "common sense" inferences is sufficient to prove their case, and have not pursued the kind of research that might generate direct evidence bearing on the question, there are fragmentary data available which—if anything—demonstrate how tenuous is the purported relationship between illegal migration and the U.S. unemployment problem.

If illegal migration from Mexico were decreasing job opportunities for significant numbers of American workers—either directly or indirectly—it follows that unemployment rates should be higher in those parts of the country having large concentrations of Mexican illegals, and lower in areas with few illegals. Of course, this is not the case: some of the lowest unemployment rates in the U.S. are found in the "Sunbelt" areas having the largest concentrations of illegal Mexican migrants. The data presented in Table 6 show that during all but

two of the last 10 years, the unemployment rate in eight of the labor markets most heavily affected by Mexican migration has been *lower* than the national unemployment rate—during a period in which the volume of illegal Mexican migration (as indicated by INS apprehensions) was increasing at an average annual rate of 25%.

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There is, indeed, a long history of wage exploitation and other forms of employer abuse against migratory Mexican labor in U.S. agriculture, both before and during the period of the *bracero* program (see McWilliams, 1939, 1942; Galarza, 1964, 1970, 1977). For example, some farm owners made it a practice to turn in their illegal migrant workers to the INS at the end of the harvest season, before they could collect their pay. Such practices seem rare now, owing in part to the current policy of the INS, which is to help apprehended illegals to collect their wages before they are returned to Mexico (Cardenas, 1977: 196; Castillo, 1978c). Even before this policy was adopted, however, only 17 out of 493 apprehended Mexican illegals included in Bustamante's early survey complained that their employer had turned them in to the Border Patrol in order to avoid paying their salaries; and 14 of these 17 migrants had been working in Texas! (Bustamante, 1978: 190).

Nor is exploitation in the form of paying illegal migrants at a rate below the legal minimum wage the normal practice today. Recent research has shown that no more than a quarter to a third of Mexican illegals are now paid less than the minimum wage.

PLAINTIFF'S EXHIBIT 210

A SURVEY OF THE UNDOCUMENTED POPULATION IN TWO TEXAS BORDER AREAS

Prepared by Avante Systems, Inc. and Cultural Research Associates

U.S. COMMISSION ON CIVIL RIGHTS

Texas State Advisory Committee

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An important finding was that less than one-fifth thought they might be replaced by United States citizens if they were to leave their current jobs. Those responding affirmatively though that if United States citizens were to be employed, they would receive better wages than the undocumented persons, but treatment would otherwise be relatively equal.

The survey indicates displacement of United States citizens' jobs to be unlikely for another reason. Almost three-fourths did not need to speak English on the job, and fifty-six percent (56.0%) didn't need to understand English.

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The respondents were also aksed if they found the Mexican American community helpful. Sixty percent of the El Paso respondents did not, while 23.0% did find Mexican Americans helpful. In the Edinburg/McAllen sample the responses were not so well defined. Thirty point seven percent find Mexican Americans helpful, while 28.3% do not and over a third had no answer. This information is difficult to interpret given that answers

were likely to be noncommittal; for example, respondents would answer: "No mas que mis amigos y familia; de quien habla?" ("No more than my friends and family; of whom are you speaking?") One respondent stated, "A todo Mexicano se sospecha de ser illegal...." ("All Mexicans are suspected of being illegal....") This feeling might tend to promote resentment among Mexican Americans.

PLAINTIFF'S EXHIBIT 294

TEXAS EDUCATION AGENCY

ANNUAL REPORT OF REVENUE, EXPENDITURES AND FUND BALANCES FOR THE TWELVE MONTHS ENDED AUGUST 1979

[page 10]

Federal grants receivable represent the unreceived amounts deemed to have been earned by expenditure or commitment against federal awards. This is reflected on Schedule II and the supplementary schedules.

Fund Balances of Operating and Program Funds are categorized to indicate their composition. Program encumbrances represent primarily the amounts of federal assistance recivables which have been committed to the school districts. Unobligated funds represent uncommitted against which further obligations are restricted either as to time or purpose or both; the bulk of this balance is in the Available School Fund. Unrestricted funds represent funds earned on federal programs, interagency contracts, deposits, etc., which are deposited in the Special State Fund.

Note 4:

The budget for the Foundation School Program to be funded from State funds as approved by the Foundation School Program Budget Committee was $2,163,952,154 or as much thereof as might be necessary from the following funds:

	Budget
Foundation School Program:	
Available School Fund	$ 730,064,532
Foundation School Fund	$1,433,887,662
Total	$2,163,952,154

Appropriation estimates in House Bill No. 510, Sixty-fifth Legislature, R.S., 1977, the General Appropriations Act, were:

	Estimated Appropriations
State Funds:	
Foundation School Program—	
General Revenue Fund	$ 659,773,221
Foundation School Fund	$ 451,790,888
Available School Fund	$ 680,563,676
Total Foundation School Program	$1,792,127,785
Textbook Fund	2,346,875
Traffic Safety Fund	487,045
Certification and Proprietary School Fees	171,425
Total State Funds	$1,795,133,130
Federal Funds	411,692,293
Total	$2,206,825,423

The variations in distribution between estimated appropriations and expenditures for the Foundation School Program funds and expenditures appearing in Schedule I are due to the statutory requirement that the General Revenue Fund bear these educational program costs in excess of the funds available in the Available School Funds and the Foundation School Fund and to final adjustment of advances to school districts.

PLAINTIFF'S EXHIBIT 301

PROCEEDINGS OF THE INTERNATIONAL LITERACY DAY CONFERENCE

Washington, D.C. **September 8, 1978**

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DR. BOYER

Keynote Address
Dr. Ernest Boyer
Commissioner of Education

. . .

This conference celebrates the thirteenth UNESCO International Literacy Day. It is based on the central premise that literacy—acquiring written language skills—is a basic human right. It acknowledges that the capacity to send and recieve messages sets humanity apart from all other forms of life, and that through language we are bound together in the profound interdependence we call society.

All we know, all we fear, and all we hope is created and conveyed through symbols, and a man or woman who does not master the written word is isolated from the past, ignorant of the future, trapped in a tiny world of

narrow possibilities, and tragically cut off from the benefits of life.

President Carter, in his International Literacy Day proclamation, declared that "Education is one of the most important gifts our society can give to its people..." Especially in our modern world—adequate communication skills are essential to improve the lives of all people, and guarantee their basic human rights. The President went on to say that every illerate adult is an indictment of us all.

Word symbols are indeed essential: they are the building blocks of complex thought. And language not only gives us dignity and freedom—it gives us the capacity to create as well.

The noted Brazilian educator and philosopher, Paolo Freire, observed that, "Learning to speak and write ought to be an opportunity for men to know what speaking any word really means: a human act implying reflection and action. As such it is a primordial human right and not the privilege of a few." This is the central thesis of this conference.

In recent years our global push for literacy has made dramatic gains. From 1950 to 1960 illiteracy—worldwide—dropped from 44.3 to 39.3 percent. From 1960 to 1970 it dropped again, to 34.2 percent. And it has been estimated that today "only" 20 percent of the world's population cannot read or write.

But these statistics conceal much more than they reveal. In recent years, millions of people have indeed been taught to read and write, and yet these gains have not kept pace with population growth.

It has been estimated that more than 20 million adult Americans are functionally illiterate—they just do not have the language skills they need to get along. The central inescapable facts persits. Illiteracy in both the so-called developing and the developed regions of the world is a human curse which cannot be ignored. A renewed national and international commitment to worldwide literacy is required.

In American excellence in language must the Nation's goal. Every child must be taught reading and writing fundamentals during the first three years of formal education. And in the upper grades all children must develop vocabulary and language comprehension.

This commitment to teach all children to read and write effectively is, I am convinced, a realistic goal. After all—before they ever come to school—all children havea already mastered the fundamentals of communication.

During the first 3 years of life each child—except the moste severely handicapped—begins to understand the miraculous process we call language. Each child converts thoughts and feelings into symbols we call words. Each child automatically interprets sound distinctions we can phonemes. And, each child—with little or no coaching— shapes the tongue and teeth and oral cavity to reproduce such complicated sounds as "R" and "L" and "N" and "K."

To move from the spoken to the written word is simply an extension of a profoundly complicated process already acquired by young children, and we should assume success, not failure, for each student. To put the issue as pointedly as I can—I'm convinced children will learn to read and write in school if these skills are given top priority.

President Carter—in the Basic Skills and Educational Quality Act he has sent to Congres—has underscored the fact that teaching every child to read and write is a top priority of this Administration. In the proposed legislation every State is encouraged to develop a statewide literacy plan—both for young children and adults. The new legislation also calls for a closer partnership with parents. Schools cannot teach children all alone and parents must participate more actively in the education of their children.

PLAINTIFF'S EXHIBIT 438

ILLIGAL ALIENS

Impact of Illegal Aliens on the County of San Diego January 1977

[page 34]

The following data are the results of the survey:

1. *Sex.* All of the 217 respondents were males. This was the case since only males are detained at the Chula Vista Border Station due to inadequate detention facilities. Apprehended females and children 14 years and under are, as a rule, placed on a bus or special van and transported to the International Border Station at San Ysidro, California, where they are then escorted into Tijuana, Baja California.

2. *Age.* The ages of the 217 respondents ranged from 15 to 61 years of age and the average age was 26.8 years. More specifically, 23 percent were 15-20 years of age; 54 percent were aged 21-30; and 23 percent of the respondents were aged 31-65. The average age of 26.8 years

compares closely to the average age of 28.5 determined by David S. North and Marion F. Houstoun in a similar study performed for the U.S. Department of Labor of 793 apprehended illegal aliens. The survey by North and Houstoun was conducted in 19 different sites across the country, of which San Diego was not one of the sample sites. The North-Houstoun survey was performed at INS District Offices such as Los Angeles, New York City, San Antonio, Detroit, Chicago, Miami, Seattle, San Franciso, Newark and Washington, D.C.

3. *Country of Origin.* Mexico was the country most cited by the respondents as their country of origin. Of the total 217 illegal aliens interviewed, 95 percent were from Mexico; 4 percent from Guatemala; and 1 percent from the country of El Salvador.

4. *Marital Status.* The marital status of the 217 illegal alien respondents was divided almost equally between married and single persons. More precisely, 51 percent of the interviewees were single; 45 percent were married; while the balance of 3 percent were separated. The statistics on married respondents determined by this survey compares closely to the 47.7 percent marital status determined by the North and Houstoun study of March 1976.

5. *Education.* The U.S. civilian labor force 18 years or older has an average of 12.4 years of schooling. In comparison, the survey to ascertain the educational level of the 217 illegal alien respondents determined that 32 percent of those interviewed had 1-3 years of schooling; 32 percent had 4-5 years of education; 12 percent had 7-9 years; and 4 percent had 10 years or more. This indicates that almost 65 percent of the respondents had no more than a 5th grade education.

6. *Location at Time of Apprehension.* It cannot be said that illegal aliens are mostly found residing and

working in areas noted for having a high percent of legal resident aliens. Statistics indicate, and Border Patrol Officers state that illegal aliens will travel as far as necessary to obtain and hold employment.

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14. *Method of Salary Payment.* Three quarters of the respondents were paid by check (75%), 8 percent were paid in cash; 2 percent received cash plus room and board; 7 percent were paid by check and in room and board; 1 percent received only room and board; 1 percent were paid only in commodities; and 6 percent preferred not to respond to the question.

These results correspond closely to the study performed by Bustamante of El Colegio de Mexico, of 509 illegal aliens returned to Mexico by way of eight Mexican border cities. His study revealed that 85.3 percent of the interviewees were paid by check, 7.7 percent were paid in cash, and 6.3 percent stated that they had not been paid and wages were owed them.

15. *Taxes and the Illegal Alien.* On the question of whether employers deducted taxes (unemployment insurance, compensation insurance, social security, disability insurance), from the wages of those illegal aliens found employed at the time of apprehension, 81 percent of the respondents stated that various forms of taxes were deducted from their income...

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Internal Revenue Service Officials, however, believe that illegal aliens do pay their share of taxes since it appears that most employers in San Diego do apply the appropriate taxation to illegal alien wages. This perspective is also shared by the San Diego Farm Bureau. Both maintain that it behooves the employers to impose the

appropriate tax structure to illegal alien wages, otherwise the employer is liable for any deficiencies upon audit by the Internal Revenue Department.

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According to Los Angeles Times report, the perspective of jobs becoming available as a result of illegal aliens vacating job slots failed to materialize in Los Angeles when 2,154 illegal aliens were apprehended while on the job. In this case, the State Human Resources Development Agency identified the newly created job slots and attempted to fill the 2,154 vacancies with citizen residents living in Los Angeles area. the effort failed. Some of the reasons for the failure were: (1) most employers paid less than the minimum wage rate, (2) the job categories were not appealing to the local resident (a matter of prestige), and (3) applicants were discouraged by not only the low wages but also the difficulty of some jobs, and the long hours demanded by the employers.

In San Diego, the displacement of local residents by illegal aliens in job categories during unemployment is an issue of much debate and great concern. San Diego reached an all time high in unemployment statistics when the number of workers out of a job reached 11.8 percent in June of 1976. Advocates of "crackdown measures" on illegal aliens cite the issue of unemployment and the balance of payments as a grave problem to the nation.

Persons who defend the issue of illegal aliens on moralistic values contend that undocumented immigrants should be allowed to accept existing jobs when in fact it is not illegal for employers to hire illegal aliens. Additionally, these same defendants argue that illegal aliens work at jobs not wanted by the general American public as a result of low wages, difficulty of work, and

the social stigma attached to manual labor. North and Houstoun determined that illegal aliens do not displace Americans within the skilled labor market. They do, however, compete for jobs within the secondary labor market level with disadvantaged people. At this level of competition the outcome is determined by who is willing to accept the lowest wages and work the longest hours. The following is a quotation by North and Houstoun:

> "...Certainly, the findings of our survey are consistent with the claim that illegals are 'taking jobs that no American wants'. Most respondents were working their occupation, their wages, and their hours. Clearly, the majority of our respondents had found employment in jobs that, for the most part, offer the least in economic rewards, social status, job security and upward mobility. Few were earning incomes that would provide a family with more than a subsistence level of life, by American standards.

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In April 1975, the responsibility for "indigent burials" shifted from the County DPW to the County Public Administrator. Research during the period of April 1975 through June 1976 indicates that a total of 41 illegal aliens were provided burial services at County expense--the cost was $8,079. All 41 of the deceased persons were of Spanish surname as identified by the documents in their possession.

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Chapter 4

CONCLUSIONS AND RECOMMENDATIONS

This chapter includes conclusions of the study, implications of the findings and recommendations. The chapter also includes issues recommended for further research.

CONLUSIONS

Based on the data of six selected areas of study, the San Diego County Immigration Council concludes that the major factors causing the illegal immigration phenomenon between the United States and Mexico are international disparities in economic conditions and job opportunities. It is also concluded that illegal aliens do impact local social services by approximate yearly cost of $2,000,000, and it is further estimated that illegal aliens contribute an approximate yearly total of $48,800,000 in taxes from wages earned locally.

It is concluded that San Diego is the most impacted area in the world by the flow of illegal aliens. In this regard, San Diego comprises but 3.3% of the 2,000 mile border front to Mexico, yet San Diego accounts for 43% of the total number apprehended along the border. This figure represents of all apprehended in the San Diego County area are from the country of Mexico.

Illegal immigration increases annually and research indicates that most illegal entrants are apprehended from two to six times or more.

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aliens such as those performed by David North and Marion Houstoun and Jorge Bustamante. Their studies indicate the United States government is receiving

much more from the illegal aliens in the form of tax and social security deductions than what the illegal aliens receive in social services.

The study area concerning exploitation was covered by a series of interviews with Chicano community-based social service agencies and individuals who are in a position to have contact with illegal aliens. Additionally, interviews were conducted with 217 apprehended illegal aliens that were detained at the Chula Vista Detention Center. Based on the data obtained from the two categories of interviews, it can be reasonably concluded that some illegal aliens are exploited by employers and landlords. Accounts of exploitation have been reported in local newspapers such as the recent article which cited a case of a rancher in Borrego Springs who was convicted for transporting and harboring illegal aliens. It was alleged that he paid the illegal workers $1.00 an hour for a 14-hour day.

PLAINTIFF'S EXHIBIT 448

A SURVEY OF TEXAS INDEPENDENT SCHOOL DISTRICTS AS A FUNCTION OF THE ALIENAGE PROVISIONS OF SECTION 21.031 OF THE TEXAS EDUCATION CODE

By

Gulf Coast Legal Foundation

March 1980

[page 5]

Table 1

Question 1: "Prior to the Fall of 1975, did your school district exclude undocumented

alien children on the basis of their immigration status?"

Independent School Districts with Enrolled Student Population of 10,000 or more			Independent School Districts with Enrolled Student Population under 10,000		
	Number	Percent		Number	Percent
Yes	4	17.4	Yes	1	4.2
No	19	82.6	No	23	95.8
Totals:	23*	100%		24**	100%

* 6 missing cases
** 7 missing cases

Table 2

Question 2: "Do you currently have enrolled any undocumented alien children who are paying tution?

Independent School Districts with Enrolled Student Population of 10,000 or more			Independent School Districts with Enrolled Student Population under 10,000		
	Number	Percent		Number	Percent
Yes	0	0	Yes	0	0
No	25	100	No	26	100
Totals:	25*	100%		26**	100%

*4 missing cases
**5 missing cases

Table 3

Question 3: "If an undocumented alien child attempted to enroll in your school district, what would you presently do: (a) admit child free; (b) admit child upon payment of tuition; or (c) exclude child entirely?"

Independent School Districts with Enrolled Student Population of 10,000 or more			Independent School Districts with Enrolled Student Population under 10,000		
	Number	Percent		Number	Percent
Admit free	6	25	Admit free	7	28
Admit tuition	6	25	Admit tuition	5	20
Exclude	11	45.8	Exclude	3	12
Don't know	1	4.2	Don't know	10	40
Totals:	24*	100%		25**	100%

*5 missing cases
**6 missing cases

PLAINTIFF-INTERVENOR EXHIBIT 47

PRELIMINARY REPORT
DOMESTIC COUNCIL COMMITTEE
ON ILLEGAL ALIENS

DECEMBER 1976

[page 132]

C. PERSONAL CHARACTERISTICS

A review of data relating to personal characteristics can be extremely useful in assessing the impact of the presence of the illegal alien. For example, if the population is young, we can predict that the group will not place heavy demands on services for the aged in the near future. If the population is predominantly male, we can expect that demands on hospital maternity facilities would be small.

Nationality

There is little data available on the national origin of the illegal alien population. The most comprehensive data is the numbers of deportable aliens apprehended by the INS. Ninety percent of apprehended illegals are Mexican citizens. The non-Mexican apprehended groups break down as follows:

	Percentage	Number
Canada	12%	9,362
British West Indies & Belize	7%	5,512
Greece	6%	4,619
China	5%	4,204
Dominican Republic	5%	3,601
Philippines	4%	2,804
United Kingdom	3%	2,334
Others	59%	45,750*

*Only countries with over three percent representation in this population have been included. Because of rounding, percentages add up to 101%. (INS, 1975)

While it is reasonable to assume that Mexican nationals form the largest element within the illegal alien population, it is probable that they constitute far less

than ninety percent. Several researchers have suggested that the true percentage is closer to sixty percent, but this estimate appears to be no better than an educated guess. (North, 1976) As previously mentioned, the apprehension rate is biased by the emphasis of the INS enforcement activity. It is also biased by the ease in identification of many Mexicans on the basis of racial characteristics. Another aspect of enforcement efforts which may further skew the figures is that the INS spends relatively little effort in attempting to locate visa abusers. If we are to believe the findings of certain studies, fewer Mexicans are in the visa abuser category. (North, 1976)

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The study done by the Mexican Government in 1972 revealed that although eighty percent of those interviewed stated that they were willing to go back to the U.S., sixty seven percent reported they were not paid regularly and/or were still owed wages when apprehended. (Mexico, 1972)

Availability of Jobs:

Many of the illegals apprehended by INS are discovered at their place of work. While no clear indication of the success rate of undocumented workers in finding employment is available, some information is available for the Mexican group.

Some studies indicate that a number of illegal aliens have considerable difficulty in finding jobs. One study reported that finding a job presented far more difficulty for the illegal alien than eluding the INS. A second study indicated that only forty-seven percent of the voluntary departures interviewed were abel to find a job. An earlier study indicated that most illegals are unsuccessful in locating a job. (Cornelius, 1976; Mexico, 1972; Samora, 1971)

DEFENDANT' EXHIBIT 4-16

PORTIONS OF BOE V. WRIGHT

DALLAS I.S.D. LITIGATION, HEARING ON APPLICATION FOR PRELIMINARY INJUNCTION

TESTIMONY OF WILLIAM J. CHAMBERS

[Page 137]

Q. Would you please state and spell your name for the record?

A. Yes. I'm William J. Chambers, (spelling) C-h-a-m-b-e-r-s.

Q. And what is your present occupation, sir?

A. I am District Director of the U.S. Immigration and Naturalization Service for the Dallas District.

Q. And for how long have you held that position?

A. Since April of 1977.

Q. And prior to that time were you employed with the Immigration Service?

A. Yes, I was.

Q. For approximately how many years?

A. Approximately twenty-nine.

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Q. Are you aware of the number of non-immigrant students in your total district office?

A. We had a survey in recent months past and we had a total in the vicinity of sixty-five hundred within the Dallas district.

THE COURT: Sixty-five hundred non-immigrant students?

THE WITNESS: Visa students.

THE COURT: Visa students?

THE WITNESS: These are ones who have entered the country, are legally in student status within the district.

THE COURT: How big is your district?

THE WITNESS: We cover North Texas, the 120 northernmost Counties of Texas, which is more or less a line just above Waco straight across to the Louisiana border to New Mexico, everything north of that in Texas, plus the State of Oklahoma.

[page 157]

Q. Approximately how many children do you think have been put through deportation procedures in the past twelve months, let's say, in this District office?

A. Not – very few. Generally we do not issue on children because generally there is no problem with them taking whatever action is indicated as far as the parents is concerned. I do have personal knowledge of a particular instance where the mother was ordered deported and we did not issue as far as the children were concerned and they refused – they refused to depart. So then we had to in turn issue orders, take the children to hearing before they could be removed.

[page 159]

Q. Do you have any sense or can you make any estimate at all as to the number of people that this 13,000 figure that you mentioned as to the number of that 13,000 that brought children with them here into the United States, the approximate percentage? Do you have any feeling for that at all?

A. I would say less than five percent. This is a – solely an estimate on my part.

Let me add also that within our District our manpower precludes us from patrolling the illegal alien situation. Consequently, we get the most out of our manpower possible so we do not concentrate on seeking out families. Our priorities for the past few years have been locating employed aliens and, consequently, we have not concentrated on removing families. This is one of the reasons why we have very few figures or statistics as far as families and children.

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THE COURT: Do you have an opinion as to the number of illegal aliens in your District?

THE WITNESS: We have what we use for our own purposes based on the various things, prior apprehensions, and our knowledge of our area, and we estimate that within the Metroplex area which is the main population of our District, that there's probably in excess of a hundred thousand illegal aliens within the Metroplex area and including our complete District, including Oklahoma, in excess of two hundred thousand.

THE COURT: What's the Metroplex area, for the record here?

THE WITNESS: Dallas, Fort Worth and suburbs.

[page 186]

Q. Do you think or do you have an opinion as to whether or not figures since 1975 have increased even higher than that?

A. They have continued to increase yearly since that time.

Q. Yes, sir. And in the words of the House Judiciary Committee, "This wholesome violation of the law disrupts that legal and orderly flow of aliens into the United States and threatens the integrity of our system of immigration. The 766,600 aliens apprehended in fiscal year 1975 is almost double the 386,194 immigrants admitted legally during the same year."

Would you agree with that?

A. Yes, this is a continuing trend.

Q. That's 766,600 apprehended in '75. Do you have any knowledge or figures more current than that?

A. Yes. The past – the past fiscal year in excess of one million were apprehended.

[page 188]

Q. Yes, sir. Would you have an estimate as to ratio or percentage between the number of illegal aliens apprehended and actual number who are here and unapprehended?

A. Well, one figure that we have used within the Service over a continuing period of time is that we probably do not apprehend more than one out of eight that crosses the border.

Q. Is that a conservative estimate?

A. I feel it is.

Q. It may be higher?

A. It could be.

THE COURT: You're talking about eight million?

THE WITNESS: I'm referring to the fact that we estimate we only apprehend one out of eight.

THE COURT: One out of eight. So, you apprehend, say – I forgot what the figure was.

THE WITNESS: In excess of a million in the past fiscal year.

THE COURT: In excess of a million. So, you think there are seven million more?

THE WITNESS: I would say that that's a good possibility.

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Q. Would you think presently it's in excess of the twelve million if it were twelve million in '75?

A. Of course, you've got an in and out flow as far as aliens are concerned. I think the twelve million estimate would be a legitimate estimate.

[page 189]

Q. Now, do you think it would also be attractive to aliens if they could get a free public education for their children in Dallas, Texas?

A. I think that would be attractive to most anyone.

[page 190]

Q. (By Mr. Smith) Of the deportable aliens apprehended in fiscal year 1975, 87 percent have entered the country surreptitiously and 99 percent of these entries were across the Mexican border. Would you agree with that?

A. Yes, I'm sure this is true.

[page 500]

TESTIMONY OF MANUELA PRUNEDA

Q. Would you please state your full name?

A. My name is Manuela Pruneda.

Q. Spell that for us.

A. M-a-n-u-e-l-a P-r-u-n-e-d-a (spelling).

Q. Ms. Pruneda, where are you employed?

A. I work for the Dallas Independent School District.

Q. What's your position?

A. I'm Assistant Director of Personnel.

[page 511]

Q. (By Mr. Florsheim) Ms. Pruneda, what would the effect be on the bilingual teachers currently employed by the Dallas district if there was a substantial influx of illegal alien children into the district?

A. Well, probably we would lose a considerable number, because many times when we bring teachers, they think "Dallas" and they have great expectations, and then when we assign them into our schools – like our buildings are very old. Some of our facilities are not what they have in other areas.

Because of our court order and the restrictions in buildings, there's this – they are not in ideal classrooms right now; and one of the key selling points is our enrollment, our 1-to-27 overall ratio where sometimes they end up with less children, and I think that if we are to increase that number and did not have that that we could use to recruit them, I would imagine that they would either leave us or they wouldn't come if they were elsewhere.

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TESTIMONY OF JACKIE ST. CLAIR

Q. Would you state your name, please?

A. Jackie St. Clair.

Q. Would you spell your last name?

A. S-t. C-l-a-i-r (spelling).

Q. Where do you live, Mr. St. Clair?

A. Austin, Texas.

Q. How are you employed?

A. I'm the Executive Director of the Texas Building and Construction Trades Council, AFL-CIO.

[page 528]

Q. Has organized labor attempted to do anything about this problem?

A. Yes. We've introduced legislation.

[page 529]

Q. What does it provide, in brief? Just briefly describe what it provides for.

A. It would be that anybody – that any recruiter or labor agency not having a license would be subject to a Class A misdemeanor, and anyone that was – any person or employment or labor agent who violates any provision of this act shall be guilty of a Class A misdemeanor, or any person shall be – any person shall be punished by a fine of not less than $200.00 nor more than one thousand for each common or agricultural worker. And this was strictly domestic and agricultural work.

[page 539]

Q. (By Mr. Smith) Do you know of anything else that attracts them over here besides what you testified to – of your own personal knowledge?

A. Well, being one, the education. I think they put their kids in school.

THE COURT: Well, they can't get in school, can they, under Texas law?

THE WITNESS: Well, they're not supposed to.

THE COURT: That wouldn't attract them.

[page 625]

TESTIMONY OF SALLY AGUIRRE DYSART

Q. Would you please state your full name?

A. Sally Aguirre Dysart.

Q. Would you please spell it for the reporter?

A. A-g-u-i-r-r-e D-y-s-a-r-t (spelling).

Q. Mrs. Dysart --

THE COURT: I got that. How do you spell Sally: with a "y" or "ie"?

THE WITNESS: With a "y."

Q. (By Mr. Florsheim) Where are you employed?

A. In the Dallas Independent School District.

Q. What is your job

Q. I'm presently the principal of Sydney Lanier vanguard school.

[page 620]

Q. (By Mr. Florsheim) Digress just a moment, Mrs. Dysart. Where were you born?

A. I was born in Mexico City.

Q. Where were you educated?

A. I was brought up in Mexico City and went to school, and came to Dallas in 1956.

Q. You entered the country legally, I assume.

A. Yes, I was very legal.

Q. What is your educational background, college level?

A. Well, I graduated from Mexico -- from high school in Mexico City, and then I started out in California at a public junior college, and then I went to Washington, D.C., thought I was going to be a diplomat, and then I came to Texas and finished at Texas Tech University.

Q. What degrees do you have?

A. I have a BA an -- with my major being Spanish, my minor education, and I have a Master's in early childhood bilingual education. I have my bilingual certification, early childhood certification, supervision certification, administrative certification.

Q. Is that all in Texas?

A. Yes, sir.

Q. Okay. How long have you been with the Dallas Independent School District?

A. Eleven years.

Q. Did you start out as a classroom teacher?

A. Yes. I was very fortunate. I was the first bilingual kindergarten teacher in Dallas.

Q. How long were you a classroom teacher?

A. With the Dallas district, two years.

Q. Did you leave the district at that time?

A. Did I leave the district?

Q. All right.

A. Well, I started out as a classrom teacher and then became a program supervisor for the bilingual program at its inception in 1971.

Q. How long were you in that position?

A. How long have I what?

Q. Were you in that position.

A. As a bilingual supervisor?

Q. Yes.

A. From '71 to '74; and then I went over to early childhood supervision, and then went into curriculum writing, so I've gone through practically every phase of the educational process, from the classroom on up to the principalship.

Q. Prior to being Sydney Lanier's principal, where were you located?

A. At Bonham Elementar School – that's a K-3 center – as a principal.

Q. Was that the last school year?

A. Yes.

Q. How long were you at Bonham?

A. One year and seven months.

[page 638]

Q. (By Mr. Florsheim) Based on your knowledge of the Bonham district, do you have any idea how many illegal alien children would be in that district?

A. I'd say easily a hundred.

Q. In the K-3?

A. In K-3. It would take in three or four neighboring schools, because we have had situations where the children, if they are not allowed into one school, they'll try the next one that's adjacent, so there were about three schools there that were impacted with requests for entrance.

Q. Do you think that you'd get at least a hundred at Sydney Lanier?

A. Oh, I bet we'd have three hundred easily.

Q. What effect would that have on your current program of education at Sydney Lanier?

A. Well, it has many implications, a tremendous amount of implications, because, number one, I would have to restructure the whole composition of my existing classes; number two, and maybe that should be one and starred and underscored, is that I right now have a vacancy at the fifth grade level because there are no bilingual teachers available.

I have an Anglo teacher who is there as a warm body, but she is not fulfilling her role as a bilingual teacher, and I would need at least – at least – two more per grade level to take care of these children.

Q. Per grade level?

A. Per grade level, yes, sir.

Q. Do you have the space for them? Let me ask you that.

A. No, I don't, not with eighteen portables on my campus.

Q. Are those portables full?

A. Oh, gosh, yes.

Q. Is the main building full?

A. Yes, sir.

Q. Do you have any room for more portables?

A. No. They would have to go on the blacktop, and that would be very, very bad for the physical education program.

[page 642]

Q. Based on your knowledge of your district, the Bonham district, and your experience in the bilingual program, what – do you have any idea what percentage of illegal alien children might be expected to speak passable English?

A. Well, maybe one percent. If you have just come from the interior of Mexico, obviously you've not been exposed to English.

So we had one lady that tried to enroll her child – and she was from Honduras – just day before yesterday, so there was no English whatsoever; and fortunately I could converse with her in Spanish.

But the illegal alien definitely does not have a knowledge of English; and if it is, it is most limited.

I've never come across one who has knowledge of English, let me put it that way – in my experience.

Q. What about the Spanish spoken by the average illegal alien child for Mexico?

A. All right. There again it will depend. If you can say that a child is literate – that means that he knows how to read and write; therefore he has a good speaking command of the language. If he is just functional, he can only speak it but he is not ready to read and write.

There are many children – and I know, being a Mexican – that have never been in the schools in Mexico. That means that they are not literate, so that is one level of the way that we can check dominance.

So you have double trouble. If you are not functional or not literate in Spanish and not literate in English, which one are you going to choose to teach them in? If they're literate in Spanish, then you can start thinking about teaching them in English.

Q. Based on your knowledge, would you say that most of these illegal alien children would be illiterate?

A. Well, that would depend. You would simply have to ask them, what has been your experience. Have you been in school before?

If you're nine years old, you assume the child has been in three or four years, but many of the children have not, because they have traveled in the migrant stream with their parents or they have tried to get into the United States.

And that kind of society, that kind of Mexican society, is very mobile. I don't know whether you

know about the Mexican culture or not, but most -- and I'm talking about the agrarian culture.

They don't have a future orientation. They go from sunup to sundown. They talk about today: I'm not going to plan for tomorrow; all I want is to get enough in my children's mouth and a roof over my head. And if that includes school, fine; and if it doesn't include school, fine. So you have to be really knowledgeable about the culture of the average alien.

Now, there are many, many aliens that come up here -- and I was one that was educated and legal, so it's a different ballgame when you're dealing with illegal people that are fleeing -- they're scared. Once you get them in the school, they're still scared, because they're afraid they might be picked up by what they call the migra, which is immigration officials.

Q. Does that make it more difficult --

A. It makes it very difficult. I'll tell you why.

[page 645]

THE COURT: Have you had any experience with an illegal alien child --

THE WITNESS: Yes.

THE COURT: -- in a school class?

THE WITNESS: Yes, I did. Would you like me to tell you about it?

THE COURT: Well, you can summarize it.

THE WITNESS: All right. He was in the third grade, and this was at the school where I just came from, Bonham.

And he was in the third grade, learning English, but his father would not give us a telephone number where father could be located.

And the child was sick and we had to locate the parent, or try to, and we couldn't

And this was the point that I was trying to make, that it compounds my job as an administrator when I'm dealing with children whose parents have to be devious, or feel that they should be devious, about giving you information that is very important to us, because we cannot assume responsibility without a written permission from the parent.

And sometimes they don't even want to sign their names to documents.

THE COURT: Go ahead.

THE WITNESS: That's all I was trying to say.

Q. (By Mr. Florsheim) You testified that there are cultural differences, not just with illegal aliens but any alien child coming from Mexico.

A. Yes. There is a difference in the culture of the Mexican-American and the Mexican. Did you know that?

Q. You just can't take an alien from Mexico and say he's going to be just like a Mexican-American.

A. No way, because he hasn't been exposed to an American way of life.

Q. Is that a complicated educational process?

A. Yes, sir.

Q. Does it make it more difficult to teach?

A. Yes, sir, and the case in point was just one that I mentioned.

[page 664]

Q. Therefore, your one percent estimate was based on the premise that the undocumented children that you're talking about have been here a very short time.

A. Oh, yes, absolutely.

Q. A very short time.

A. Absolutely.

Q. Is it your testimony, therefore, that the children that you were talking about, the one hundred and the three hundred, have probably been here a very short time?

A. What do you consider a short time?

Q. Well, it was your statement and your projections. What do you consider a short time?

A. Okay. A short time would maybe be three months, but they are not – sometimes the children or the families don't even stay here long enough for those children to absorb any language, because they're back across again.

[page 671]

RE-DIRECT EXAMINATION

BY MR. FLORSHEIM:

Q. Mrs. Dysart, you mentioned the problems in the classroom if you put these children in there, and the difficulties raised for the teacher.

Doesn't it cause some problems for the teacher professionally as well, morale-wise?

A. Well, the bilingual teacher is the one I feel most sorry for, because she has double the curriculum. She has to develop a curriculum in English; she has to develop the curriculum in Spanish.

And she has to be a very, very versatile human being in that classroom, because she's dealing with two distinct languages.

When I went to school in Mexico, I went to my English classes and I went to my Spanish classes, and one teacher just took care of one language.

Up here in the United States, it's one teacher taking care of both languages, and that's very difficult and it does compound her ability to perform, and she is – that's why we have the rotation of our bilingual teachers.

They just get completely worn out. It's an enormous responsibility, and I don't think very many people understand what a bilingual teacher goes through.

[page 695]

TESTIMONY OF MS. SALINAS

Q. Ms. Salinas, what's your educational background, college level and above?

A. I went to junior college for a year and a half in Brownsville, Texas, at Texas Southmost College. I then received a grant to TWU to work in the BECA program, which was the bilingual program in which we taught for two years as opposed to six weeks in the teaching program.

And we taught two years, and we came to the campus in the morning in Fort Worth and we came to the campus in the afternoon to receive classes.

I then received my B.S. in elementary education, my kindergarten endorsement; I then went on to SMU to receive a Master's of Liberal Arts with emphasis in bilingual education from SMU, and I am presently going to North Texas State University, working on a school administration certification.

Q. Where are you currently employed?

A. At James B. Bonham Elementary.

Q. In what capacity are you employed?

A. A bilingual resource teacher.

Q. This is the Dallas Independent School District?

A. Yes, sir.

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Q. If you have one of those children in the classroom, say, of an otherwise generally literate children, do you have to take away time from the other students?

A. Yes, sir, because the child cannot understand even the most basic, simple instructions.

Q. Do you have various degrees of language proficiency? You've described the illiterate child who can't even function in Spanish.

Are there degrees within the illiterate or the other students?

A. Yes, there are. You have different levels of proficiency, and of course this is what we test to find out. Now, the Mexican child for which the bilingual program was designed is entirely different from the Mexican alien child, because the program was designed, like I say, for the Mexican child here in the states.

Q. Do you mean Mexican or Mexican-American?

A. The Mexican-American here in the states, which was that the child would come already in kindergarten having some knowledge of some basic concepts.

And we take him in his native tongue and give him instruction in his native tongue, with exception of ESL. That's English-as-a-second-language; that's oral development.

And then we take him on, after constantly having oral language. When we saw that they were ready to make the transition in English, then we make the transition to English.

Now, this does not occur sometimes until the third grade, so we're talking about starting at five years old and not maybe making the transition to Spanish until they're in the third grade; and the program was designed to work this way.

Now, these children – a lot of these children who come to kindergarten – the Mexican-American child has probably already been in school two years. He's had the television as an influence, so he has some type

– even though he's Spanish dominant, he's got some concepts.

Now, when the Mexican alien child comes from age five to age thirteen, I can't even begin to describe to you the different levels of illiteracy that they're at. I mean, they don't even – even working in their language, in oral language, we work, of course, with a lot of pictures; and even if you were asking them the picture in Spanish, they could come up with an entirely different word that would not exist possibly in the Spanish language. It might be from some dialect or something.

So we have to first – originally in our bilingual program, we start with ESL. Well, with the Mexican alien child, we would then have to turn the program around and completely revamp the program and start with a Spanish oral language program, because they're not even literate in their own language.

Q. You have taught Mexican alien children, haven't you?

A. Yes, I have.

Q. Have you taught – are there cultural differences that create problems?

A. Yes, I'd say mostly in the social aspects. They have a hard time adjusting, of course. The children that have been here in the States are sort of open and demonstrative and have no problems communicating, whereas the Mexican alien child takes a long time to get into the flow of things and doesn't adjust – adjusts very slowly.

Q. Is it relatively easy to, shall we say, spot the illegal alien in a classroom? Do the children pick him out?

A. No, sir, because it's really hard to answer that, because they're not there with any regularity. They come and go a lot, and it's sort of hard to even associate them with part – being part of the classroom.

And they come at different times, so you don't have large clusters coming at one particular time; so, no, not really, because when they come, they come one or two and . . .

Q. What do you mean, they come and go a lot?

A. Well, they don't usually start at the beginning of the year, which presents a real problem with instruction. They don't start at the beginning of the year, after we've gone through all the testing and begun to put the children in the different levels of instruction, because there are several different levels of instruction; there's not just – we don't use the shotgun method of instruction.

There are six or seven levels of instruction, sometimes three in English and three or four in Spanish, so . . .

Q. Do most Mexican aliens stay for a full school year?

A. Oh, no, sir. They come even – let's say – for instance, I've had some that come as late as March or April; will be there and be there for a month or – no, two or three weeks.

And in the past, my experience has been they'd be there and then they got wind of the immigration making spot checks, and then they were gone; and they weren't just gone for a couple days; they were gone for two or three weeks, sometimes months if they came in at the beginning of the year, and then all of a sudden they'd reappear.

So, of course, all that time there was no instruction taking place, and they were already coming to us. Sometimes – like when Gabe Allen in west Dallas was a K-6 school, I taught first grade at that time, and there was a teacher who had a fifth grade student – I guess he was thirteen; they went ahead and put him in the fifth grade.

He said, I don't know where to begin with this child; he can't write his name and he doesn't even speak very much. Could you go ahead and take him with your group?

I said I'd be glad to take him, except of course on the K-1 level and K-2, the furniture and the chalkboards and everything is adjusted a lot lower to work with the younger children.

So here was this 13-year-old child who came into the room, of course, with a bunch of six-year-old children, and he sort of stuck out; but he was basically where my children were, and a lot of my children had passed him – left him behind.

Q. Illegal alien children do get into schools. Based on your observations, what percentage of alien children, legal or illegal, who come into the schools are likely to speak sufficient English to be able to be described as other than monolingual?

A. English, did you say?

Q. How many Spanish-speaking students can get along in English sufficiently well to function in an English-speaking classroom?

A. Oh, my gosh. One percent, and that may be too much.

Q. Would this be the same thing for an alien child who's been in the country for a year?

A. No. This would – well, it depends what the child had been doing in the past year.

Q. What if that child had no – received only Spanish at home?

A. That's usually the case; and a lot of the children that are Spanish dominant pick a lot of language up watching television. But a lot of these children don't have a television, so even if they were here for a year and were not in the schools, the likelihood of picking up any English is very slim.

Q. Even if they pick up some words, do they pick up sufficient to function?

A. No, sir, they will not be functional.

Q. Do they pick up the right kind of English?

A. That's questionable.

Q. As a bilingual teacher, do you have problems with a high student-teacher ratio, say 30-to-1?

A. Yes.

Q. Does that limit your ability to teach?

A. Oh, yes.

Q. Would 25-to-1 be really difficult in a bilingual situation?

A. No, that would be adequate.

Q. Adequate?

A. Yes, sir.

Q. If you have a student-teacher ratio of 25-to-1 and that is suddenly increased to, say, 30-to-1, would that take away from the education of the class as a whole?

A. The entire class, yes, sir.

Q. What if those five additional students were illegal aliens? Would that complicate the situation even more?

A. Yes, sir.

Q. In what way?

A. Okay. Well, I couldn't put them – they would not sit in a group of even – let's say I have three or four Spanish groups that were Mexican-American children. Well, they could not sit in those groups, because this child coming from Mexico would probably need some of Spanish oral language first, while the Mexican-American child would already be receiving English oral language, so he would be a step behind the Mexican-American child already in the classroom.

So that would have to create more groups that didn't even exist, so we're talking about seven to eight groups.

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No. 80-1538

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OCTOBER TERM, 1980

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and
STATE OF TEXAS

Appellants

vs.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, et al.,

Appellees

On appeal from the United States Court of Appeals for the Fifth Circuit

Motion to Dismiss or Affirm

LAW OFFICE OF LARRY DAVES
Attorney at Law
P.O. Box 1115
Tyler, TX 75710
(214) 593-0184

VILMA S. MARTINEZ
PETER D. ROOS—Counsel of Record
Mexican American Legal Defense and Educational Fund (MALDEF)
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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I.

REPORTED DECISIONS

The opinion of the District Court is reported at 458 F. Supp. 569 (E.D. Tex. 1978). The decision of the Court of Appeals affirming the ruling of the District Court is reported at 628 F.2d 448 (5th Cir. 1980).

II.

STATUTES INVOLVED

In addition to those statutes set forth in the Jurisdictional Statement the following are involved:

(a) Tyler (Tex.) Independent School District Policy, which states: The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens and who are residents of this school district free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.

(b) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(c) The Supremacy Clause of the United States Constitution, Article VI, Clause 2.

III.

ARGUMENT

A. The Appeal Should Be Dismissed.

This Appeal should be dismissed for the Jurisdictional Statement does not comply with this Court's Rules. The Jurisdictional Statement is defective because a copy of the Notice of Appeal is not appended to it, contrary to the requirements of Rule 15 (1)(j)(iv).

B. The Decision of the Court of Appeals Should Be Summarily Affirmed. The Clear Language of the Equal Protection Clause Compels the Finding That Undocumented Aliens Are Protected by Its Provisions.

While this court has never directly ruled that undocumented aliens are protected by the equal protection clause, the clear language of that provision, this Court's rulings on its companion, the due process clause, and simple logic com-

pel summary affirmance of the Court of Appeals on this issue.

The Fourteenth Amendment prohibits a state from denying equal protection of the laws to "any person within its jurisdiction". At prior junctures of this litigation, the state has argued that an undocumented alien is not a "person" for purposes of equal protection. Since "persons" are protected by the due process clause and since this Court has regularly ruled that undocumented aliens are persons within that companion clause, the state no longer advances that claim. As will be discussed, *infra*, they make a wise choice. The new claim advanced is that the term "within its jurisdiction" is not found in the due process clause. Thus, it is argued, the cases decided under that clause are inapposite. This argument and its conclusion that the equal protection clause therefore does not protect undocumented aliens *even when* they are within a state's territory fails for several reasons. First, the case law does not reflect any differential treatment of the scope of these clauses based on this language; rather, this Court and others have consistently considered coverage to be coextensive. Secondly, the simple language of this provision is logically construed to mean merely that insofar as a state has power ("jurisdiction") over an individual, it must accord him equal protection. Finally, it is a fundamental principle of law, as articulated by this Court for more than one hundred years, that the basic principles of American law attach to those within its territory; conversely, aliens without the geographical territory of the United States are not so protected.

Setting forth the principle that the basic protections of this country attach to even those who are transitorily within the United States is *Carlisle v. United States*, 16 Wall. 147 (1872). This Court in *Carlisle* ruled that,

> The rights of sovereignty . . . extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence in transitory. *All strangers are under the protection of the sovereign while they are within his territories* and owe a temporary allegience in return for that protection.
>
> 16 Wall. 147, 154 (emphasis added).

This principle that basic protections adhere to all within the territory of the state as distinguished from those physically external is repeated in various rulings of this Court. Recent decisions discussing this principle include *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

More directly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court expressly ruled that the term "persons within the jurisdiction" as found in the equal protection clause applies to *all* within the territorial confines of a state. As the Court stated,

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. *These provisions are universal in their application to all persons within the territorial jurisdiction.*
>
> 118 U.S. 356, 369 (emphasis added).

The Plaintiffs in *Yick Wo* were Chinese aliens seeking protection against a discriminatory licensing policy. While the Court found no need to discuss the legal status of the aliens in *Yick Wo*, its statement of legal principle is clearly

not limited by status. This was made clear in a subsequent ruling in which this Court cited the entirety of the *Yick Wo* statement in upholding the rights of undocumented aliens to due process protections. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

Wong Wing has been repeatedly cited in upholding the rights of undocumented aliens to due process protections. Recently, in *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court observed that,

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment protects every one of these persons from deprivation of life, liberty, or property without due process of law . . . *Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection.*
>
> 426 U.S. 67, 77 (emphasis added). See also *The Japanese Immigrant Case*, 189 U.S. 86 (1902); *Shaugnessy v. U.S. ex rel Mezei*, 345 U.S. 206, 212 (1953).

In effect, the Petitioners ask this Court to overrule *Wong Wing* and the foundational support for it found in *Yick Wo*, and to revise eighty five (85) years of precedent. Such a request is properly denied by summary affirmance of the lower court's rulings.

Solace to the Petitioners is not found in any divided authorities among the circuits. Those courts which have been compelled to address the question have ruled that basic equal protection protects all aliens within the territory of the United States irrespective of legal status. See e.g., *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971)

Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975), *Holly v. Lavine*, 529 F.2d 1294, 1296 (2nd Cir. 1975).[1]

In sum, no need for further clarity is required of this Court. Summary affirmance is appropriate.

C. The Decision of the Court of Appeals Should Be Summarily Affirmed. This Statute Violates the Equal Protection Clause Irrespective of the Standard Utilized.

In their argument, the Petitioners fail to identify any findings of fact or conclusions of law which would support their contention that the State of Texas properly justified the exclusion of undocumented children from their schools. There was, in fact, a dearth of justification. The two lower courts in this case have found what "facts" were offered to be little more than arguments. Given the obvious inability of the Petitioners to identify failures of findings by the courts below, summary affirmance is appropriate. This is especially so given the fact that the courts were able to reach their conclusion without reliance upon a standard of strict scrutiny.

---

1. The Petitioners cite *United States v. Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979) as providing contrary authority. The *Tsuda Maru* case involved the fishing rights of Japanese fishermen. These individuals, as the case makes clear, were not residents within the territory of the United States and thus the case fits clearly within the authority distinguishing the rights of aliens within and without the territory of the United States. Further, the case involved a question of federal authority over international affairs, and the interpretation of the Fifth Amendment in that context.

The only contrary authority found is in the state court challenge to the statute in question in the instant case. In a ruling devoid of analysis, the Texas Court of Civil Appeals upheld the constitutionality of Section 21.031. *Hernandez v. Houston Ind. School Dist.*, 558 SW 2d 121 (Tex. Civ. App.—Austin, 1977, writ ref'd N.R.E.).

IV.

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal; alternatively, this Court should affirm the rulings of the courts below.

Respectfully submitted,

LAW OFFICE OF LARRY DAVES
Attorney at Law
P.O. Box 1115
Tyler, TX 75710
(214) 593-0184

VILMA S. MARTINEZ
PETER D. ROOS—Counsel of Record
Mexican American Legal Defense
and Educational Fund
(MALDEF)
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800

Attorneys for Appellees

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Brief of Amici Curiae School Districts of: Harlingen Consolidated Independent School District, Mission Independent School District, Brownsville, Independent School District and McAllen Independent School District, in support of Appellants' Jurisdictional Statement

ORRIN W. JOHNSON, Esq.
402 E. Van Buren Street
Harlingen, Texas 78550
NEAL KING, Esq.
P. O. Box 1025
Mission, Texas 78572
TONY MARTINEZ, Esq.
954 E. Madison, Suite 3
Brownsville, Texas 78520
TRAVIS HIESTER, Esq.
P. O. Drawer 3725
McAllen, Texas 78501
Attorneys for Amici Curiae

PHILIP B. KURLAND, Esq.
JONATHAN E. ROTHSCHILD, Esq.
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1. Does a State statute which requires nonresident citizens and nonresident aliens, including illegal aliens, to pay tuition in public schools while exempting all resident citizens and resident aliens from such charges constitute an invalid classification in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. May a State statute providing for free tuition in public schools only for "residents" of the school district define illegal aliens as nonresidents of the school district?

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CONSTITUTION AND STATUTES INVOLVED

THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS EDUCATION CODE § 21.031, which provides in pertinent part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of 5 years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

NO. 80-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of Tyler Independent School District and Its Board of Trustees, ET AL.,
And
STATE OF TEXAS,
Appellants,

v.

J. and R. DOE, as Guardian Ad Litem For I. DOE, ET AL.,
Appellees.

Brief of Amici Curiae School Districts of: Harlingen Consolidated Independent School District, Mission Independent School District, Brownsville, Independent School District and McAllen Independent School District, in support of Appellants' Jurisdictional Statement

INTEREST OF AMICI CURIAE

The amici curiae are school districts of the State of Texas located on or near the Rio Grande River which constitutes the boundary between the United States and Mexico. It is primarily on these school districts that the burden falls of educating illegal aliens from Mexico in the event that the Texas statute in question here were held to be unconstitutional. It is they who will have to bear the financial costs that will result from a ruling of unconstitutionality. It is their educational programs which

must be diluted if they are required to accommodate the large number of illegal aliens with free tuition. Despite the direct impact on them of adjudications of unconstitutionality, these districts, like those of the suburban areas around the City of Detroit in the Detroit school desegregation case, *Milliken v. Bradley*, 418 U.S. 717, 729-30 (1974), are not parties to, and have not participated in, the litigation that will decide their fate. These school districts seek to have the Court understand their position on the validity of the Texas statute in question, a position which, at best, has only been adumbrated and not passed by any parties to the litigation.

I. THE TEXAS STATUTE IN QUESTION HERE DOES NOT CONTAIN ANY CLASSIFICATION IN TERMS OF ALIENAGE OR CITIZENSHIP NOR ANY CLASSIFICATION BETWEEN LEGAL AND ILLEGAL ALIENS. THE STATUTE DISTINGUISHES BETWEEN RESIDENTS — WHETHER CITIZENS OR ALIENS — AND NON-RESIDENTS — WHETHER CITIZENS OR ALIENS.

The Texas statute in issue does not contain a classification on the basis of citizenship or alienage. Resident citizens and resident aliens are both entitled to free tuition. Nonresident citizens and nonresident aliens are both required to pay tuition. The classification was based upon a judgment by the State that the school districts should not provide free education for those who are not legally resident or domiciled within the school district, whether alien or citizen at the cost of those who are residents. Surely it does not test the bounds of constitutional classification for the State to require the local school districts to afford services to those who are fully and properly

ensconced within the districts while denying it to those who are not. This Court has made clear in its rulings that a State may properly treat residents and nonresidents differently in affording free tuition within its schools. Thus, in *Vlandis v. Kline*, 412 U.S. 441, 445, 452-53, 453-54 (1973), the Court said:

> The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition fees than do bona fide residents. The State's right to make such a classification is unquestioned here.
>
> * * *
>
> We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.
>
> * * *
>
> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

And see Michelson v. Cox, 476 F.Supp. 1315, 1319 (S.D. Iowa 1979); *Hooban v. Boling*, 503 F.2d 648, 650 (6th Cir. 1974); *Montgomery v. Douglas*, 388 F.Supp. 1139, 1142 (D. Col. 1974); *Pelletreau v. Savage*, 381 F.Supp. 582, 585 (D. N.H. 1974); *Kelm v. Carlson*, 473 F.2d 1267, 1268 (6th Cir. 1973); *Sturgis v. State of Washington*, 368 F.Supp. 38 (W.D. Wash. 1973), *aff'd mem.*, 414 U.S. 1057 (1973); *Weaver v. Kelton*, 357 F.Supp. 1106, 1110 (E.D. Tex. 1973); *Johns v. Redeker*, 406

F.2d 878, 883 (8th Cir. 1969); *Clarke v. Redeker*, 259 F.Supp. 117, 123-24 n. 7 (S.D. Iowa 1966).

The question here is, rather, whether a State is required by the Equal Protection Clause to treat illegal aliens as residents within the meaning of the statute. As we shall show in the next section of this brief, there can be no such requirement for treating illegal aliens as residents. To say, however, that the issue is not one of classification between citizens and noncitizens or between legally admitted aliens and illegal aliens is not to say that such a classification is not valid. It is, indeed, not a classification made by the State of Texas, but a classification made by Congress, which has plenary authority over immigration and naturalization. Legal aliens are in this country at the invitation and tolerance of the United States. As such, they are not subject to discriminatory classification by the States, except for overriding policy reasons. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Ambach v. Norwick*, 441 U.S. 68 (1979). As this Court noted in *Mathews v. Diaz*, 426 U.S. 67, 80 (1976):

> [The] fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. [Emphasis in original.]

The proposition becomes more cogent in light of the fact that an obligation on the part of the school district to provide educational facilities to illegal aliens results in a proportionate diminution in the educational facilities

that it can make available to its resident citizens and resident legal aliens.

II. THE TEXAS STATUTE PROVIDES ONLY THAT ILLEGAL ALIENS SHALL NOT BE TREATED AS RESIDENTS FOR PURPOSES OF FREE TUITION IN ITS PUBLIC SCHOOLS.

As heretofore suggested, the real question in this case is whether Texas is forbidden to treat illegal aliens as nonresidents of a school district and, therefore, not qualified to receive free tuition. A cognate question was reviewed by this Court in *Elkins v. Moreno*, 435 U.S. 647 (1978). There, the question was whether Maryland had to treat "G-4 aliens," aliens with a nonimmigrant and temporary status in the United States, as domiciled within the State for purposes of receiving reduced tuition at the University of Maryland. "Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case." 435 U.S. at 662. The Court held that the answer to this question was dependent on federal statutory law and Maryland common law.

In that case, however, this Court ruled that the federal statutory law did not require that G-4 aliens maintain a permanent residence abroad. Here, it is clear that the immigration laws do so require as to illegal aliens. It cannot be said of illegal aliens what the Court said of nonimmigrant aliens in *Elkins*, 435 U.S. at 666-67:

> Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an inter-

> national treaty organization, both he and his family would lose their G-4 status. . . . Nonetheless, such an alien would not necessarily be subject to deportation or would he have to leave and re-enter the country in order to become an immigrant.

Under the federal immigration laws, illegal aliens may not remain within this country and are subject to immediate deportation. 8 U.S.C. § 1227. While legal aliens may change their status from nonimmigrant to immigrant, 435 U.S. at 667-68, illegal aliens are not equally able to change their status from illegal to legal.

The fact that the laws of the United States did not preclude a G-4 alien from establishing domicile did not resolve the issues in *Elkins*, for the Court made it clear that whether such an alien could establish domicile in Maryland was a matter of Maryland law: "[T]he question whether G-4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law." 435 U.S. at 698. The case was accordingly remanded to the Maryland Court of Appeals to resolve the question.

The Maryland Court of Appeals held that a G-4 alien could establish domicile in Maryland. *Toll v. Moreno*, 284 Md. 425, 444 (1979). In doing so, however, it carefully delineated the distinction between aliens entitled to remain in this country under the immigration laws and those who are illegally here. It quoted from an earlier Maryland Court of Appeals decision, *Dorf v. Skolnik*, 280 Md. 101, 116-17 (1977):

> If under federal law a particular individual must leave this country at a certain date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law.

> It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile. [Quoted, 284 Md. at 442-43.]

The Texas law on the question of the meaning of residence for purposes of its educational code is equally clear. The courts have defined "resident," both for citizens and aliens. Residence means the permanent abode of the school child or its parents. It is, as the United States District Court said in *Arredondo v. Brockette*, 482 F.Supp. 212, 221 (S.D. Tex. 1979), in reliance on *DeLeon v. Harlingen Consolidated Independent School Dist.*, 552 S.W.2d 922 (Tex. Civ. App. 1977), "more closely related to the concept of domicile." 482 F.Supp. at 221. Federal decisions underline the validity of the Texas proposition in the statute that illegal aliens cannot be residents for purposes of the school code. See *Castillo-Felix v. I.N.S.*, 601 F.2d 459, 464 (9th Cir. 1979); *Anwo v. I.N.S.*, 607 F.2d 435 (D.C. Cir. 1979); see also, *e.g.*, *United States v. Corsi*, 287 U.S. 129, 133 (1932); *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964); *Werblow v. United States*, 134 F.2d 791, 792 (2d Cir. 1943); *United States v. Day*, 43 F.2d 917 (2d Cir. 1930); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States v. Anastasio*, 120 F. Supp. 435 (D. N.J. 1954); *United States v. Parisi*, 24 F. Supp. 414, 419 (D. Md. 1938); *In re Scriver*, 9 F. Supp. 478, 479-80 (W.D. N.Y. 1935). Illegal entry by aliens cannot ground legal residence.

Thus, whether under the law of the State, which this Court held to be controlling in *Elkins*, or even under the federal decisions construing the immigration laws, as in *Castillo-Felix* and *Anwo*, illegal aliens cannot establish the residence or domicile requisite to qualify for free tuition within a Texas school district.

III. CONCLUSION.

This Court should accept jurisdiction of this appeal and reverse the judgment below which improperly held the Texas statute in question to be violative of the Constitution of the United States.

Respectfully submitted,

ORRIN W. JOHNSON
402 E. Van Buren Street
Harlingen, Texas 78550
Attorney, Harlingen Consolidated Independent School District

NEAL KING, Esq.
P. O. Box 1025
Mission, Texas 78572
Attorney, Mission Independent School District

TONY MARTINEZ
954 E. Madison, Suite 3
Brownsville, Texas 78520
Attorney, Brownsville Independent School District

TRAVIS HIESTER, Esq.
P. O. Drawer 3725
McAllen, Texas 78501
Attorney, McAllen Independent School District

Attorneys for Amici Curiae

PHILIP B. KURLAND, Esq.
JONATHAN E. ROTHSCHILD, Esq.
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Of Counsel

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NOS. 80-1538 AND 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY
Appellants

VS.

UNITED STATES
Intervenor-Appellee

AND

CERTAINED NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Appellees

JAMES PLYLER, ET AL.
Appellants

VS.

J. AND R. DOE, as Guardian Ad Litem
for I. Doe, ET AL.
Appellees

Consolidated Appeals From The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR THE APPELLANTS

JOHN C. HARDY
200 Peoples National Bank
Building South
Tyler, Texas 75702

Attorney for Tyler I.S.D.

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affiars

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

QUESTIONS PRESENTED

1. Whether aliens unlawfully present in the United States are "persons within a state's jurisdiction" as that phrase is used in the equal protection clause of the Fourteenth Amendment.

2. Whether a state is obligated to provide a tuition-free public education to children unlawfully present in the United States.

PARTIES

The parties are the same as in the court below in each case.

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JAMES PLYLER, ET AL.
Appellants

VS.

J. AND R. DOE, as Guardian Ad Litem
for I. Doe, ET AL.
Appellees

Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR THE APPELLANTS

These appeals are from orders of the Fifth Circuit entered on June 5, 1981, and February 23, 1981, declaring Section 21.031 of the Texas Education Code to be unconstitutional to the extent that it affects the rights of undocumented alien children to a tuition-free public education. In Re: Alien Children Education Litigation

is a consolidation of numerous suits brought by undocumented aliens against various school districts, the State of Texas and the Texas Education Agency. The United States intervened as a plaintiff. Doe vs. Plyler was brought by the guardian of an alien child against the State of Texas and the Tyler school board. The suits were consolidated on appeal to this Court.

OPINIONS BELOW

A. *In Re: Alien Children*

The opinion of the District Court for the Southern District of Texas, entered on July 21, 1980, is reported at 501 F.Supp. 544. A copy of that opinion is reproduced in Appellants' jurisdictional statement at pages 17-110.

The Fifth Circuit summarily affirmed the district court on February 23, 1981.

B. *Plyler vs. Doe*

The opinion of the District Court of the Eastern District of Texas, entered on September 14, 1978, is reported at 458 F.Supp. 569. A copy of that opinion is reproduced in Appellants' jurisdictional statement at pages A35-A82.

A permanent injunction was entered by the court on September 14, 1978.

The opinion of the Fifth Circuit issued October 20, 1980, and affirming the district court, is reported at 628 F.2d 448 and reproduced at A1-A32 of the jurisdictional statement.

JURISDICTION

A. *In Re: Alien Children*

On July 21, 1980, the United States District Court for the Southern District of Texas, Houston Division, issued its memorandum opinion and order in MDL-398 declaring unconstitutional Section 21.031(a)-(c) of the Texas Education Code and enjoining the application of said statute. The district court's jurisdiction was based upon 28 U.S.C. §1343(3) and (4), 42 U.S.C. §1983, 42 U.S.C. §2000d and the opinion of the Judicial Panel on Multidistrict Litigation entered November 16, 1979. 482 F.Supp. 326 (Judicial Panel on Multidistrict Litigation 1979). The matter was appealed to the United States Court of Appeals for the Fifth Circuit, No. 80-1807, which honorable court summarily affirmed the district court on February 23, 1981. Notice of appeal was filed in the Court of Appeals on March 2, 1981. Probable jurisdiction was noted on June 15, 1981.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(2).

B. *Plyler vs. Doe*

On September 14, 1978, the United States District Court for the Eastern District of Texas, Tyler Division, issued a judgment, memorandum opinion and order enjoining officers of the State of Texas from enforcing provisions of Section 21.031 of the Texas Education Code upon Tyler I.S.D. and further enjoined the superintendent and members of the board of trustees of the Tyler I.S.D. from denying admission to alien children unlawfully present in the country. The district court's order was pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983. The matter was appealed to the United States Court of Appeals for the Fifth Circuit, No. 78-3311, and that honorable court issued its opinion Oc-

tober 20, 1980, 628 F.2d 448, and denied Appellants' motion for rehearing on November 17, 1980. Notice of appeal was filed on December 18, 1980. Probable jurisdiction was noted by this Court on May 4, 1981.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

These appeals were consolidated by order of the Court on June 15, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

TEX.EDUC.CODE §21.031 provides in part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are

> over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 4, of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

STATEMENT OF THE CASE

The problem of illegal immigration into the United States, and specifically into Texas, is acute. The federal government has consistently underbudgeted the INS to the direct detriment of Texas. J.A. B63; C31-2. With 250 officers per shift to patrol the 2,000— mile Mexican border, "you cannot seriously discuss full enforcement of the immigration laws." J.A. C27 (testimony of

Leonel Castillo, former commissioner of INS). "There are fewer border patrolmen on the 2,000 mile border between the United States and Mexico than there are policemen in Dallas, Texas." J.A. D6 (testimony of Mr. Chambers, director, Dallas district INS). Consequently, illegal immigration is "more or less. . . out of control." J.A. A33 (Mr. Chambers). Away from the border the INS concentrates its enforcement capabilities upon illegal aliens holding the best jobs. J.A. B55-6; B59; B62.

A political solution has not been reached by the federal government although recent administrations have made certain suggestions. It is hoped by Appellants that the current administration will succeed in moving toward a solution. However, until a comprehensive federal policy is developed, border states such as Texas will suffer the impact of federal default.

This impact is severely felt in the field of education. Texas' school districts already are dramatically affected by legal immigration. While statewide the number of presumably legal alien students in 1976 was 44,799, or 1.59% of Texas students, 9.6% of the students, or about 27,000 students, in the 61 school districts bordering Mexico were born in Mexico. J.A. B49; B81-3. Some districts have as high as a 27% Mexican alien enrollment. J.A. B106. Twenty-two percent of these students were in their first year in the border districts. J.A. B30. One year later the statewide total was 51,348, or 1.8% of the total enrollment. J.A. B49. Brownsville I.S.D. had 25,600 students in 1979-80. J.A. D5-6. From September, 1979, to February, 1980, over 1,200 students from Mexico were enrolled in addition to the approximately 90% of the 6,000 such students enrolled from 1972 to 1979. J.A. D6; D15.

This influx has seriously affected the quality of education. In Brownsville, 50% of the elementary schools are portable buildings, some dating from World War I. J.A.

D18-19. The facilities are not air-conditioned. J.A. D6. Efforts at obtaining impact aid from the federal government have failed, J.A. D4-5; D16, and these aliens do not significantly add to the tax base of the district. JA B84-5; D21; D24-5; D49.

> A national policy had permitted a flow of immigrants into the country, and a local school district was being penalized for that.

J.A. B84. Neither unpredictably nor unreasonably the Brownsville community

> is totally against any kind of bond issue... People are very well aware of the number of children that are being allowed in from Mexico and a lot of the people are saying, why should we have bond issues to build schools for children from Mexico.

J.A. D8. This was the testimony of Mr. Besterio, superintendent of Brownsville I.S.D. and a Mexican-American. J.A. D2; D32. Eighty-seven percent of the students in his district are Mexican-American. J.A. D25.

While local districts remain responsible for the provision of the capital outlay necessary for facility construction, J.A. B40-1, the state has not been unresponsive to these needs. Beginning with $75 million in 1975 and adding $132 million in 1977 and $100 million in 1979, the state has provided equalization aid to property-poor districts. J.A. D40-1. However, the federal government has not provided *any* funds which may be utilized for basic educational needs; all federal funds are restricted to programs supplemental to basic programs which must first be comparable in state and local expenditure to those programs not assisted by the federal money. J.A. C70-1.

While their problems differ somewhat from the border districts, the large metropolitan school districts in Texas are likewise faced with limited resources.

> [L]arge city schools throughout the United States have been given the challenge of educating the most expensive children with the greatest level of need.

Such children require the expenditure of "five, six, $700 per child . . . ." J.A. D42-3. Of particular significance is the current shortage of bilingual teachers to serve the limited English proficiency lawful residents. For example, in spite of intensive recruiting efforts, Dallas was unable to serve approximately 2,500 of its 8,000 limited English students with a bilingual program. J.A. D33-4. *See, Boe v. Wright,* 648 F.2d at 437.

The impact of admission of illegal aliens is significant. Estimates of the total number of illegal aliens in the United States range up to 12 million. J.A. B13 (3.9 million); B20 (2.7 million); B52 (6 to 8 million and 12 million); B67 (6 million). Estimates for Texas are in the range of 675,000 to one million, conservatively. J.A. B21; B52. Houston I.S.D. was thought to contain 4,210 to 5,625 undocumented children of school age in December, 1977. J.A. B54-5; B67. The district court in *In Re: Alien Children* suggested that the total number of undocumented Mexican school age children in Texas was approximately 20,000. 501 F.Supp. at 577-78.

The record indicates that as many as 99% of these children are Mexican and may be monolingual in Spanish. J.A. A34; B57; E75; E82-3; E92-3. As noted by Mrs. Sally Dysart, the principal of a Dallas school who grew up in Mexico, J.A. E78:

> There are many children—and I know, being a Mexican—that have never been in the schools in Mexico. . . . So you have double trouble.

J.A. E83. Mr. Besterio testified as to education in Matamoras, the Mexican sister city to Brownsville:

> They are trying to do the best job they know how. They are limited in their capacity to build buildings and they have one factor that we don't have and that is they can limit the number of students that come into their school, and that means that, once they are full, they say, 'we have no more room.' So there is a tremendous amount of children that are not going to school because of lack of space in the schools.

J.A. D8. A witness for Appellees testified to studies which show that 55.5% of illegal aliens have had no formal education and another 19.2% had less than a fourth grade education. J.A. C4-6.

One witness testified that illegal aliens are generally lower in educational capabilities than legal immigrants. J.A. B65-6. Others testified that illegal aliens are usually "overaged and oversized," J.A. B72; have cultural differences from native Mexican-American students which cause educational difficulties, J.A. E85-6; are migratory in nature, J.A. D88; E86; E90-2; and present problems due to their fear of discovery, J.A. E85. Present bilingual programs were not designed to meet these children's needs. J.A. E89-90.

Aside from the myriad educational problems presented by illegal alien children, it is crystal clear that their admission into school dilutes the services available to educate disadvantaged lawful Mexican-American residents. The record is clear that illegal aliens concen-

trate in enclaves in areas of concentrated Mexican-American population. J.A. B12-13; B64-5; E81. Thus, illegal immigration most heavily impacts portions of metropolitan areas, J.A. B12-13, and locales along the U.S./Mexico border where the population is predominantly Mexican-American. J.A. B85-6. Federal Title I funds are not sufficient to serve even ⅔ of the eligible population in Texas with compensatory programs. J.A. C74. Illegal aliens further dilute Texas' resources and obviously disrupt bilingual programs in metropolitan areas. J.A. D88-9; E75-6; E81; E87; E89-90; E93-4. Very simply,

> you overcrowd classrooms. You dilute the tax dollars that would normally be in the educational program, and they've got to go to these students too, so the less resources available per child, you're going to get less quality education.

J.A. B85.

The incentive for illegal immigration caused by education is clear. In addition to the testimony of Mrs. Dysart and Mr. Besterio quoted above, the Area Handbook for Mexico discloses that in 1970 primary education in Mexico is "ideally" six years and is divided into three cycles of two years. The schools "attempt to give every child as much knowledge as possible during the first two years *since the majority of pupils never reach the upper cycles*" (emphasis added). J.A. E21. A more recent study, defendants' Exhibit 8-1 (*In Re: Alien Children*), indicates that over 4-½ million children between the ages of 4 and 15 are not in school, about 25% of the total population. Further, the quality of education is often inadequate. Even overcrowded Texas border district schools are rather enticing compared to no school at all.

The testimony clearly recognized that education is an

incentive for family unification. Ms. Marion Houstoun, a witness called by plaintiffs in *Plyler* and co-author of the North-Houstoun study of illegal aliens, J.A. B14, agreed that the illegal aliens would "bring their children in order for the illegal alien children to get education." J.A. B24. Dr. Hensley, a former teacher, principal and program director for elementary education at the Texas Education Agency who conducted a 15-month research project on the Texas border districts, J.A. B81, testified that "one of the prime motivations" for legal immigration is education. J.A. B86. Obviously it is; witness the 6,500 student visas in the Dallas INS district. J.A. E70-1. The testimony of Mr. Estevan Flores, a professor at Pan American University testifying on behalf of the plaintiffs in *In Re: Alien Children* who had conducted a study of illegal aliens in Houston dated March, 1980, J.A. D102-3, provided some specific examples of the effect of the educational incentive, J.A. D104-6, and testified as follows:

> Q. You don't think the Mexican people would like to keep their families together?
>
> A. Yes, they would.
>
> . . .
>
> Q. Let's assume that the ages of the children are school age, and there are some in Mexico, as evidenced by the questionnaire where the gentleman says he has four children in Mexico in school that he wants to bring over here.
>
> A. In the previous questionnaire, yes.
>
> Q. And you don't think that suggests, along with your statement, that the Mexican people would like to keep their families together, that we would try and unify these two groups of

families by bringing them to the United States?

A. We had a few of our respondents say that, yes. The majority did not say that.

Q. Did any of them say, 'I will not bring my children to the United States to unite my family:?'

A. No. We didn't ask that question.

J.A. D106. To belabor the obvious, Superintendent Besterio testified:

There are a number of children in Mexico, without trying to be an expert of any kind, that are not going to school in Mexico and what is to keep them from seeking an education over here?

The Court: Don't they have free public education in Mexico?

A. In a way, but they limit the space and, once they are full, they don't let them in school.

J.A. D12-13; see also, J.A. E74-5. Finally, Mr. James Duderstadt, former teacher and advisor to the commissioner of education in the Virgin Islands, J.A. D94-5, testified to the extreme impact upon education in the Virgin Islands due to the admission of legal and illegal aliens and the attendant incentive for migration. J.A. D96-102.

In fact, the absence of a tuition-free education actually causes some illegal alien children to return to Mexico. Sister Emiliana Cardenas, who teaches illegal alien children in Houston, J.A. C43, testified that she knew "of some children who return to Mexico when they cannot get the education or the instruction they need, the

parents send them back." J.A. C43-4. *See also,* plaintiffs' Exhibit 455 *(In Re: Alien Children).*

Finally, plaintiffs' Exhibit 455 *(In Re: Alien Children)* indicates that education of children causes some illegal aliens to remain in the country.

> Some of the migrants had children living with them in the U.S. who reached school age before the family could return to Mexico; their enrollment in school postponed return migration, at least until the children finish primary or secondary school. In such cases, if the parents do return to Mexico, children who have received most or all of their schooling in the U.S. usually choose to remain here.

The Future of Mexican Immigrants in California, Wayne A. Cornelius, March 1980. p. 23.

SUMMARY OF ARGUMENT

There is no basis for holding that the equal protection clause of the Fourteenth Amendment is applicable to illegal aliens. Such a holding would subvert any orderly solution of a pressing political problem and would cause an unwarranted intrusion into an area reserved to the political branches of government.

If the equal protection clause is nevertheless held applicable, Section 21.031 of the Texas Education Code is constitutional. Education is not a fundamental right of illegal aliens, and such aliens do not constitute a suspect classification. Preservation of the state's resources for the education of its lawful residents and the elimination of an inducement for illegal immigration are sufficient basis for the statute. That the statute serves these purposes is clear. Texas should not be compelled to educate the indeterminate number of alien children who may

enter in order to secure an American education or for purposes of family unification. Otherwise, the state will be required to promote permanent, unlawful immigration.

ARGUMENT AND AUTHORITIES

1. *Illegal aliens are not within the scope of the equal protection clause.*

While the due process clause of the Fourteenth Amendment has been interpreted to apply to illegal aliens, *Shaughnessey v. United States ex rel. Megei*, 345 U.S. 206 (1953), this Court has never addressed the issue whether the equal protection clause is likewise applicable. Both the language and import of the two clauses fundamentally differ. *See, Mathews v. Diaz*, 426 U.S. 67, 68 (1976). Whereas the due process clause provides procedural protection for whatever rights a person might otherwise possess, the equal protection clause guarantees equal rights to "government benefit[s]." *Doe v. Plyler*, 628 F.2d 448, n.18 (5th Cir. 1980). Neither logic nor precedent warrants the application of the equal protection clause to illegal aliens. Such an extension would inevitably interfere with political decisions reserved to the legislative and administrative branches of government in part by providing inducements for illegal entry. Further, the grant of equal protection rights to illegal aliens would ignore the significance of our national borders and reward persons for violating federal law.

As noted by Judges Reavley and Clark in *Doe v. Wright*, 648 F.2d at 440, this Court has utilized

> consistent and careful language indicating that the term 'person' as used in the equal protection clause of the Fourteenth Amendment 'encompasses *lawfully admitted* resident aliens as

> well as citizens. . . .' *Graham v. Richardson*, 403 U.S. at 371, 91 S.Ct. at 1851 (emphasis added); . . . *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143, 92 L.Ed 1478 (1948) ('[t]he Fourteenth Amendment . . . embod[ies] a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws') . . .

Citing *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. den.*, 424 U.S. 910 (1976), and *Leng May Ma v. Barber*, 357 U.S. 185 (1958), they conclude:

> Therefore, it is conceivable that the Supreme Court might conclude for policy reasons that an alien, who is not lawfully residing in this country, does not constitute a 'person within [a state's] jurisdiction' and, therefore, is not entitled to equal protection of the laws.

648 F.2d at 440.

Indeed, this Court should so conclude. The many cases involving legal resident aliens are inapplicable. Legally admitted aliens are screened prior to entry, are monitored while in the country and can be deported for violation of official rules and regulations. *Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1940). Thus, these aliens stand in a type of contractual relationship with the government. In exchange for obeying the rules and laws, they are entitled to a portion of the nation's resources. An analogy may be drawn to the standards of care applicable in tort law to invitees, licensees and trespassers with citizens, legal aliens and illegal aliens corresponding respectively.

> Neither the overnight visitor . . . nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.

Mathews v. Diaz, 426 U.S. 67, 80 (1976).

The other two cases which come closest to the question indicate that illegal aliens are not within the scope of the equal protection clause. In *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), it was unanimously stated that illegal aliens "have no federal rights to employment within the country." Considering the very basic nature of the right to gainful employment, see *Truax v. Raich*, 239 U.S. 33 (1915), and in light of the brief of the petitioners in *DeCanas*, this language clearly implies that the equal protection clause is not applicable to illegal aliens.

Leng May Ma v. Barber, 356 U.S. 185 (1957), involved an alien who had been in the country for one and one-half years. This Court held that she was not "within the United States" under 8 U.S.C. §1253(h) since she had not entered the country legally. If an illegal entrant is not "within the United States," he is also not a person within a state's jurisdiction. *See also, Zartarian v. Billings*, 204 U.S. 170, 175 (1907).

The Fifth Circuit, in *Doe v. Plyler*, sought to distinguish *Leng May Ma* on the basis that statutory language was at issue and further that the question therein involved "presence" within the United States. 628 F.2d at 455. However, the English language remains the same whether a statute or consitutional provision is at issue. *See*, U.S.CONST. art. IV, §4. Moreover, the distinction concerning "presence" cuts the other way. "Within its jurisdiction" is more restrictive than merely "within." The additional words "its

jurisdiction" must have meaning. Indeed, Appellees would have a much stronger argument if the equal protection clause terminology was "within a state." *Blake v. McClung*, 172 U.S. 239 (1889).

The application of the equal protection clause to illegal aliens would constitute an intrusion of the judiciary into an area reserved to the political branches of government, for the rights of undocumented or illegal aliens are principally a political question. Wholesale intervention into the area by federal courts under the guise of the equal protection clause would frustrate any cohesive solution to the problem of illegal immigration.[1]

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislative or the Executive than to the Judiciary . . .
>
> Any rule of constitutional law that would inhibit the flexibility of the political branches of

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[1]The decisions of the lower courts herein run directly counter to federal interests in preventing inducements for illegal immigration. *See, Preliminary Report of the Domestic Council on Illegal Aliens*, pp. 40, 42, 110 (1976), U.S. Govt. Printing Office: 1977 0-241-089/1020; Plaintiff-Intervenor Ex. 47 (*In re: Alien Children)* (recommending denial of benefits to avoid inducement). Further, the lower court decisions require Texas school officials to violate 8 U.S.C. §1324 by harboring illegal aliens and inducing their entry.

> government to respond to changing world conditions should be adopted only with the greatest caution.

Mathews v. Diaz, 426 U.S. 67, 81 (1976); see, *Kleindienst v. Manedel*, 408 U.S. 753, 766-67 (1972).

However ineptly the federal government has acted in direct furtherance of its statutory policy of exclusion, it is clear that it does not intend to provide social benefits to persons who violate federal law in this regard. Federal regulations currently prohibit states from providing undocumented aliens with food stamps, 7 C.F.R. §273.4, and Aid to Families With Dependent Children, 45 C.F.R. §233.50. The latter regulation is applicable also to Aid to the Blind, Aid to Permanently and Totally Disabled, and Supplemental Security Income. *See also*, 42 U.S.C. §1382c(a)(1)(B). Further, federal law restricts the entitlement of undocumented aliens to medicare, 42 U.S.C. §1395i-2, 42 C.F.R. §405.205(b); medicaid, 42 U.S.C. §1395o, 42 C.F.R. §405.103(a)4(ii); and, under some circumstances, social security benefits, 42 U.S.C. §426a(a)(4).

Indeed, there are clear indications that Congress intends to protect state resources in the very area at issue here, education. The legislative history of the Immigration and Naturalization Act reveals congressional recognition of the burdens which excessive immigration places on domestic social institutions. Congress noted that excessive admission of aliens would "unduly charge our institutions for the care of the socially inadequate." [1952] U.S. Code Cong. & Ad. News 1672. Similarly, an argument against the increase of lawfully admitted aliens in a 1965 amendment was the "increasing shortage of educational institutions on the primary, secondary, and college levels." [1965] U.S. Code Cong. & Ad. News 3349.

Congress has been especially attentive to the impact of legal aliens on this country's educational institutions. Congress has enacted a special program to deal with legal alien students. *See*, 8 U.S.C. §1101(15)(5). In so doing, the federal government has carefully avoided any infringement upon the rights of educational entities to control their student populations. Pursuant to 8 C.F.R. §214.2(f), an alien student is not eligible for admission to the United States without a form from the pertinent school indicating that he has been accepted for a full course of study. Congress has reviewed the question of impact upon "the educational opportunities of our own citizens" in order to determine whether a limit should be placed on student visas. S.Rep.No. 1515, 81st Cong., 2d Sess. 507-9. Having shown such solicitude for the preservation of ample educational resources for lawful residents, Congress surely did not intend to frustrate that goal by requiring the states to expend their limited educational funds on illegal aliens who have not complied with the student visa program and are residing in the states in contravention of all federal immigration laws and policies. In fact, the obvious implications from the existing student visa program is that only those students who comply with its terms should be admitted to schools.

The purpose and objective of immigration regulation is obviously to prevent illegal entry by persons who have not received visas. The cause for illegal immigration is an "international push-pull." Domestic Council, p. 40. While employment is the main pull factor, "social and demographic factors such as educational facilities ... are involved." Domestic Council, p. 40. The lure of employment "is enhanced by better opportunity for schooling and training for [aliens] and their children. ..." Domestic Council, p. 42. The Domestic Council has recommended that disincentives be adopted in order to remove some of the "pull." Specifically, the Council recommended that "various benefits" be denied "to per-

sons who clearly act in circumvention of the law." p. 110. This Court has recognized the rather fundamental principle that social services should be available only to lawful residents, noting, with reference to medicaid, "surely Congress would at least require the aliens' entry be lawful." *Mathews v. Diaz*, 426 U.S. at 82.

The judiciary is not the proper branch of government to decide what resources should be dedicated to illegal aliens or what services provide undesirable incentives for illegal immigration. The force of the Fourteenth Amendment is such that not even Congress could alter any determination of policy made by the courts. *Doe v. Plyler*, 628 F.2d at 453, n. 11. Illegal aliens having entered the country by virtue of the default of the legislative and administrative branches of the federal government in the performance of their constitutional obligations to the states, such aliens are in many respects wards of the federal government. Whether and under what circumstances they are allowed to remain are political questions. Congress having failed to even attempt to require states to provide benefits such as education to illegal aliens, the courts should not interfere with this determination. This conclusion is buttressed by the observation that the application of the equal protection clause would mandate states to provide services which Congress has expressly denied to illegal aliens. *C.f., Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

U.S.CONST. art. IV, §4, provides: "The United States . . . shall protect each [state] against invasion ...." It is illogical to contend that the same fundamental charter which obligates the Union to protect Texas from invasion of illegal aliens also compels Texas to suffer the consequences of the default in execution of that obligation. It would be specious to argue that the Fourteenth Amendment, at the time it was ratified, was understood to apply to illegal aliens for there were no such aliens in existence at the time. *Kleindienst v. Mandel*, 408 U.S.

at 61. The states having signed on pursuant to an express promise of protection from invasion by the federal government, it is evident that the states did not commit themselves to the provision of benefits to the invaders.

As stated by Mr. James Pete Williams, a desegregation expert who has served many federal courts in that capacity (J.A. D77-8):

> I'm 51 years old, and all my life to me the vision of the Statute of Liberty is one literally of what I have read in the inscription looking at it face to face, send us all, send us everything, the poor, the weak, whatever, we'll take care of it. Those days are finished. That's over with. We have arrived at a point in American history where we can no longer sustain that. We cannot take the dissident populations from any country. McDade County in Florida is a gigantic example of educational problems because we took the problems that presumably, I'm just paraphrasing here, that possibly Castro is delighted not to have to cope with.
>
> . . .
>
> We have arrived at that point. It's finished. We can no longer sustain the reception of any group of people in this country. We've got to stop and breathe and plan how we're going to preserve a workable system before the inner cities of Houston, the inner cities of Cleveland, the inner cities of Dallas fall down upon us.

J.A. D85-6.

Distinctions between legal and illegal residency should not be obliterated and national borders and federal immigration law rendered meaningless. The

equal protection clause should not be held applicable to illegal aliens. Obviously, an alien living in Mexico has no equal protection rights. *Cf., Kleindeinst v. Mandel*, 408 U.S. at 62. He should not be afforded such due to his violation of federal law.

> To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worse sort of bootstrapping and would encourage aliens to enter this country surrepticiously.

Burrafato v. United States Department of State, 523 F.2d 554, 557 (2d Cir. 1975), *cert. den.*, 424 U.S. 910 (1976).

The proper scope of judicial review of a state classification concerning illegal aliens is that expressed in *DeCanas v. Bica, supra.* It is far more sound in this area to limit the question to one of whether a state statute is preempted by federal immigration law, a question resolved in Appellants' favor below. *Doe v. Plyler*, 648 F.2d at 453; *In Re: Alien Children Education Litigation*, 501 F.Supp. 544, 588 (S.D.Tex. 1980). In this manner, political and economic issues may be resolved in the forums constitutionally prescribed for consideration of such questions. Particularly in the context of social services, the scope of the equal protection clause of the Fourteenth Amendment should be limited to persons *legally* present in the country.

2. *Assuming the applicability of the equal protection clause, Section 21.031 is nevertheless constitutional.*

The principle justifications for Section 21.031 are protection of resources and the prevention of incentives for illegal immigration of school-age children. Since education is not a fundamental right of illegal aliens and since illegal aliens do not constitute a suspect classification,

Section 21.031 must be held constitutional so long as "any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); quoted in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Even in general terms, there is no fundamental right to a tuition-free education. *Ambach v. Norwick*, 441 U.S. 68, 77, n. 7 (1979); *San Antonio Independent School District v. Rodriguez*, 431 F.Supp. 231 (E.D.Tex. 1977) (three-judge court); *Montgomery v. Douglas*, 388 F.Supp. 1139 (D.Colo. 1973) (three-judge court), *aff'd*, 422 U.S. 1030 (1975); *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex.Civ.App. -Austin 1977, writ ref'd n.r.e.).

The holding of the district court to the contrary *In Re: Alien Children Education Litigation*, 501 F.Supp. at 564, not only ignores the rulings of this and other courts but fails to recognize that many of the reasons advanced for the importance of education are inapplicable to illegal aliens who have no right to participate in the democratic process. *See generally, Ambach v. Norwick*, 441 U.S. at 76-78; *Boe v. Wright*, 648 F.2d at 436-37.

Furthermore, the holding in *DeCanas v. Bica, supra*, is a direct indication that illegal aliens have no fundamental rights under the United States Constitution. As stated in *Truax v. Raich*, 239 U.S 33, 41 (1915):

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure.

See also, Examining Board v. Flores de Otero, 426 U.S. 572 (1976); *Smith v. Texas*, 233 U.S. 630 (1914). However, illegal aliens "have no federal right to employ-

ment within the country." *DeCanas*, 424 U.S. at 355. It borders on the ludicrous to suggest that illegal aliens have a fundamental right to a tuition-free education but *no* right, fundamental or otherwise, to implement that education through gainful employment.

Nor can illegal aliens legitimately be deemed a suspect class. Aliens lawfully residing in this country constitute a suspect class in some, but not all, circumstances. Compare *Foley v. Connelie*, 435 U.S. 291 (1978), with *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971). However, "the common thread running through" the cases involving aliens "is that they refer to 'lawfully resident' aliens." *Alonso v. California*, 123 Cal.Rptr. 536, 540 (Dist.Ct.App. 1975). The rationale underlying the court's decisions regarding legal aliens is totally inapplicable to this case. The court has analyzed the cases in which restrictions upon legal aliens have been held unconstitutional as follows:

> These exclusions struck at the non-citizens' abililty to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence.

Foley v. Connelie, 435 U.S. at 295. There is no inconsistency in legislation directed at illegal aliens; it is entirely consistent with the congressional determination to exclude the aliens from admission.

The denomination of illegal aliens as a suspect class would magnify the unwarranted judicial intrusion into this area attendant to a holding that the equal protection clause is applicable at all. As noted in *Hernandez v. Houston Independent School District*, 558 S.W.2d at 124, "the status of an illegal alien is hardly an unalterable or unchangeable one." *See, University of*

California Regents v. Bakke, 438 U.S. 265, 360 (1978), Justice Brennan. In effect, illegal aliens "have chosen to classify themselves." *Ambach v. Norwick*, 441 U.S. at 80. Federal law may be observed at any time. It is almost bizarre to suggest that one may gain preferential constitutional status over the great majority of our citizens by illegally entering the country. While the question was not expressly addressed in *DeCanas v. Bica, supra*, it seems clear that the result therein could not have been reached had illegal aliens been considered a suspect class.

In their discussion of the appropriate level of scrutiny, the district courts confused a challenge to Section 21.031 with a challenge to the policy of allowing illegal alien children to attend school upon payment of tuition. The statute in no way draws a distinction based upon wealth; its classification is one of legal residence. It is silent with respect to admission upon payment of tuition. Thus, the suggestion of the lower courts that strict scrutiny is appropriate because of discrimination against the poor is inapplicable to Section 21.031.

Accordingly, Section 21.031 should be reviewed under the rational basis standard. However, the state has articulated sufficient basis for Section 21.031 to be upheld regardless of the standard of review. The preservation of the state's limited educational resources and the dedication thereof to lawful residents constitute vitally important state interests. *See, Ambach v. Norwick*, 441 U.S. at 76-77. The related goal of reducing incentives for illegal immigration which drains these resources is likewise compelling. The decision of the panel in *Doe v. Plyler* is clearly in error in this regard. The intolerance of the court for the position of the Appellants may well have rested mostly upon the "harsh results" it saw attendant to a contrary ruling. 628 F.2d at 451. However, "the undisputed importance of education will not alone cause this Court to depart from the usual stan-

dard for reviewing a state's social and economic legislation." *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 35.

The preservation of the state's limited resources for education of its lawful residents is clearly a legitimate state interest.

> Cost of a government funded program is a legitimate governmental interest.
>
> . . .It is the State's interest in providing universal education, consistent with the historical policies underlying the establishment of publicly funded education in this country, while at the same time preserving its limited resources from unwarranted dilution. The major governmental policy interest behind the free public education movement in this country during the 19th century was that an enlightened electorate is necessary to maintain our democratic form of government and to preserve the liberty of the people. (Citations omitted.)
>
> . . .
>
> I conceive that the Texas Legislature, on agreeing that education is 'the very foundation of good citizenship,' could reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children, who can never—absent some form of amnesty—become citizens, exercise the franchise, or serve in the armed forces of the United States.

Boe v. Wright, 648 F.2d at 435-36. In *Nyquist v. Mauclet*, 432 U.S. 1 (1977), this Court stated:

> although such education is a laudable objective, it hardly would be frustrated by including *resident aliens* [i.e. those lawfully residing in this country], as well as citizens, in the State's assistance programs.

Id. at 11.

> The implication of the Court's statement is that including illegal aliens in a state's educational assistance programs might indeed frustrate the state's objective of the enhancement of the educational level of the electorate.
>
> Texas' interest in educating the electorate is clearly frustrated in this case. The record reveals that DISD has a total enrollment of 120,000 students and that the district is presently facing an enrollment of 8,700 Spanish-speaking students requiring bilingual education. DISD is already short of bilingual teachers and faces a problem of recruiting qualified bilingual teachers. With the projected enrollment of 2,000 to 5,000 illegal alien children from Mexico during the school year, the quality of education for Spanish-speaking citizens and legal resident aliens, who require bilingual education, will certainly decline. I conclude that §21.031 is rationally related to Texas' interest in educating the electorate in avoiding a diminution of the quality of such education.

Boe v. Wright, 648 F.2d at 437

Indeed, the record in these consolidated cases clearly establishes the adverse impact of illegal alien children upon the state's educational system. Further, the evidence herein directly rebuts the viability in this con-

text of the language quoted above from *Nyquist v. Mauclet*. Federal immigration policy already has seriously affected the quality of education in some areas of Texas and is partially responsible for the state's substantial alteration of its school financing. The admission of illegal aliens merely makes a difficult situation worse.

The irony of the state's and school district's predicament and one distinction between illegal and legal residents is that even were Appellants to succeed in adequately educating an illegal alien, he would then either be unable to secure employment commensurate with his abilities, see, e.g., *DeCanas*, or would run afoul of the federal government's selective enforcement of immigration laws. A well educated illegal alien would find himself at the top of the list for deportation. This result illustrates one basic rationale of the statute—illegal residents may be deported at any time. The state has a compelling interest in the education of its lawful residents, particularly those who are presently disadvantaged. It need not jeopardize its efforts in this regard by dedicating its limited resources to the education of children who are difficult to educate adequately and who in all likelihood would not return the benefits gained to state or national society. Clearly, Section 21.031 increases "the likelihood that [educational expenditures would be of benefit] inside the United States." *Califano v. Aznavorjan*, 439 U.S. 170, 178 (1978); see *Nyquist v. Mauclet*, 432 U.S. at 14 (Burger, D.J., dissenting).

> The Constitution does not empower the Court to second-guess officials charged with the difficult responsibility of allocating limited public [education] funds among the myriad of potential recipients.

Dandridge v. Williams, 397 U.S at 487.

The second principal justification for Section 21.031 is prevention of inducements for illegal entry. The panel in *Doe v. Plyler* stated that it had "serious doubt [of] its [21.031] exclusionary motive" because Texas had not enacted an employer sanction law and concluded that 21.031 was not rationally related to this goal because it was an "ineffectual means of discouraging illegal migration" since only a small percentage of illegal aliens bring their children into the country. 628 F.2d at 460-61. The district court in *In Re: Alien Children* adopted similar reasoning but began with the proposition that such a basis was impermissible, the matter being exclusively a federal concern. 501 F.Supp. at 578.

The weakness in these approaches is evident. While it is undisputed that the majority of illegal aliens are single men seeking employment, the lower courts overlooked the fact that Section 21.031 was intended to keep it that way. Illegal aliens who enter without their families, stay an average of 5.5 months, 501 F.Supp. at 578, n. 83, and return to Mexico do not cause the drain on educational resources or the sociological impact implicit in the illegal immigration of entire families. There is

> nothing irrational about Texas' desire to lessen the incentive for whole alien families to enter this country illegally since it is reasonable to assume aliens who bring their families would be less transient than most illegal aliens and would attempt to establish permanent, albeit illegal, residences in this country.

Boe v. Wright, 648 F.2d at 438, n. 9. While the district courts found that the statute was not an effective means of preventing illegal entry and residence, such an inquiry misses the point for "the efficacy of legislation is not the province of the judiciary." *Boe v. Wright*, 648 F.2d at 438.

Moreover, the lower courts ignored both common sense and the record set forth above in reaching these findings. One need only to look at a map and see the concentration of population on both sides of the Texas-Mexico border and be even remotely familiar with Mexico to realize that an American education and the attendant acquisition of English are significant drawing cards both for border-hopping attendance and for familial migration.

> Can it be denied that free education is an incentive to move across the Rio Grande? *Cf. Graham v. Richardson*, 403 U.S. 365, 376-80.

Boe v. Wright, 648 F.2d at 439. It cannot.

It is evident that Section 21.031 is rationally related to the goal of exclusion. The suggestion of lower courts that Texas' motive was questionable in the absence of an anti-employment statute not only is immaterial, *Hughes v. Alexandria Scraps Corp.*, 426 U.S. 794 (1976), but reflects a rationale whereby the federal government would be found disinterested in the enforcement of its immigration laws since it has also failed to enact anti-employment legislation. Apparently the lower courts did not understand the complexities of the issue of an anti-employment statute, legislation opposed by MALDEF. J.A. D94; defendants' Exhibit 14-26 (*In Re: Alien Children. See, Illegal Aliens: Analysis and Background*, p. 578, 95th Cong., 1st Sess., June, 1977. Further, Texas may constitutionally elect to retard illegal immigration by aligning state policy with Congress' exclusionary intent rather than by regulating the private sector. *Boe v. Wright*, 648 F.2d at 439.

Finally, the holding of the district court in *In Re: Alien Children* that Texas could not permissibly assert an exclusionary interest must be rejected. *Boe v.*

Wright, 648 F.2d at 438, n. 1. The differentiation between permissible state and federal interests expressed in *Mathews v. Diaz, supra*, and *Nyquist v. Mauclet*, 432 U.S. 1 (1977), is not applicable to aliens whose presence is not authorized by federal law. The source of the exclusive federal power to control immigration being implied, *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889), that power cannot be construed to justify the assertion of interests by the federal government where those interests are denied to states unless the assertion of such interests by a state conflicts with the "determination to admit [an] alien..." *Folley v. Connelie*, 435 U.S. 291, 295 (1978); U.S.CONST., Tenth Amendment.

CONCLUSION

Section 21.031 is constitutional. Evaluation of its wisdom is a legislative rather than judicial responsibility. If Congress believes that the attendant incentives for illegal immigration of children are outweighed by other factors and that the education of illegal aliens is a desirable dedication of *its* resources, it is free to act.

> All I know is just as a simple old lawyer that the federal government hasn't so far as I can tell thrown its weight around fiscally with respect to this situation.

J.A. D57 (Professor Covey T. Oliver).

> Everybody is waiting for George to solve the problem. To me, it's a federal problem whether Irish, white or black or from Cuba. They should be educated, apparently, in a federal system that's to be established to take care of the federal problem, or they should be sent home.

J.A. D87 (Mr. James Pete Williams). The problem is political; so must be the solution. The federal judiciary should not take the reins from Congress' hands. Texas should not be forced to open its schools to the indeterminate number of Mexican children who may cross the border seeking education and family unity. When this Court held that states had no power to physically control immigration, it necessarily placed the responsibility for protection of the states in the hands of the federal government. Six years have passed since the enactment of Section 21.031 and not a murmur has been heard from Congress. Congress must decide whether these children "should be educated...or...sent home."

Texas has no desire to increase its population of disadvantaged residents to the detriment of those lawfully present which is the inevitable result of the lower court's rulings. It is especially reluctant to do so in the absence of any indication that Congress desires the provision of the benefit of education and a concomitant dedication of federal resources to the problem caused by federal default. It cannot plausibly be argued that education is any more important to a child than life itself which may be denied by federal restrictions upon medicare, or than proper nutrition which may be denied by federal restrictions on AFDC and food stamps. In fact, Section 21.031 is far more rationally related to the basis set forth herein than *any* of the federal restrictions are to any conceivable basis. Since "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S. at 93, Section 21.031 of the Texas Education Code is constitutional.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

JOHN C. HARDY
200 Peoples National
Bank Building South
Tyler, Texas 75702

Attorney for Tyler I.S.D.

No. 80-1538

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In the Supreme Court

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Appellants,

vs.

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Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPELLEES' BRIEF ON THE MERITS

LAW OFFICE OF LARRY DAVES
P.O. Box 1115
Tyler, TX 75710
(214) 593-0184

VILMA S. MARTINEZ
LINDA HANTEN
PETER D. ROOS*
Mexican American Legal Defense and Educational Fund (MALDEF)
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800
Attorneys for Appellees

*Counsel of Record

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

Section 21.031 of the Texas Education Code denies local school districts State funds for the education of undocumented alien children. It further permits those districts to exclude such children or to admit them upon payment of tuition. All other children residing within a district must be provided tuition-free education for which the district receives State reimbursement. The questions presented are:

1. Whether Section 21.031, by effectively causing the exclusion of undocumented school children, denies them Equal Protection as mandated by the Fourteenth Amendment.

2. Whether Section 21.031 frustrates the objectives of Federal Education Legislation and thus is preempted.

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APPELLEES' BRIEF ON THE MERITS

CONSTITUTIONAL AND STATUTORY PROVISIONS

I The Fourteenth Amendment, United States Constitution.

II Article VI, Clause 2, United States Constitution.

III Texas Education Code ANN. tit. 2, § 21.031 (a), (b), (c) (Vernon, 1980)*

STATEMENT OF THE CASE

In May, 1975 the Texas Legislature amended Section 21.031 of the Education Code to provide that School Districts could only apply for State reimbursement for citizens or legally admitted aliens. The Legislation further specified that only those two categories of students were entitled to free public elementary and secondary education. This action followed by one month an opinion by the Attorney General of Texas that the denial of schooling to undocumented children would deny them their right to equal protection of the laws.[1]

The Tyler School District, recognizing that a tuition charge would be tantamount to exclusion, absorbed the total cost of educating children until the 1977-78 school year. Trapped between its belief that exclusion would "penalize (the children) for something their parents had done"[2] and the fact that families seemed to be moving to Tyler to escape the implementation of Section 21.031 in other districts, the TISD Board adopted a policy requiring tuition in the sum of $1,000 per annum.[3]

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*The full text of the relevant parts of these provisions are set forth in Appendix "A" to this brief.

[1]CT Ex. 1, Dec. T. 265. References in this brief will be as follows: JA (Joint Appendix); Sept. T. (September Transcript), Dec. T. (December Transcript); Exhibits will indicate the parties introducing same as follows: P. (Plaintiffs); Tex. (Texas); CT (Court).

[2]JA A-52.

[3]*Id.*

As the TISD projected, few if any parents could pay tuition.[4] Because of the cost of alternatives to public education and the limited availability of such alternatives in any case, these children were effectively denied access to any formal schooling by operation of Section 21.031.[5]

Each of the Plaintiffs was 13 years old or less and had previously been enrolled in the Tyler Schools.[6] All the parents of the children had resided in Tyler for a number of years. One single parent had resided there since 1964 and the three married couples had lived in Tyler for three (3), nine (9) and ten (10) years, respectively.[7]

Whatever the veracity of the common perception that there has been a significant upsurge of illegal immigration from Mexico, the evidence clearly reflects that undocumented aliens rarely bring their children with them.[8] The co-author of the major study on illegal immigration reported that 2.7% of their sample of illegal immigrants had children in the schools (JA B-23). That 2.7% included both documented and undocumented children (JA

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[4]JA A-53, The evidence further reflected that none of the named Plaintiffs was able to afford the tuition and thus each had been effectively excluded from the TISD (JA A-9-11, A-24, A-31); John Eaton, Deputy Superintendent of the Houston ISD testified that *no* children had tendered tuition to that district (JA B-78), the economic plight of most undocumented aliens was recognized by all witnesses (JA A-53, Supt. Plyler; JA B-8, B-10, Prof. Gilbert Cardenas; JA B-16, Marion Houstoun; JA B-66, Shane Davies).

[5]JA A-59, A-62 (Father Milam Joseph).

[6]JA A-5, A-14-15, A-23-24, A-26.

[7]JA A-7, A-16, A-23, A-28.

[8]Witnesses seemed to agree with Marion Houstoun, an expert for the Plaintiffs, that "Data on characteristics of illegal aliens are much more reliable . . . than any kind of data . . . [concerning] numbers" (JA B-14).

B-25).[9] Undocumented aliens, all conceded, tend to be young single males in search of employment.[10] The Court in *In Re Alien Children*, after hearing substantial testimony concerning this issue concluded that the most reasonable figure reflecting the number of undocumented school age children in the State was approximately 20,000. 501 F. Supp. at 577. The total school population of Texas is 2,239,000 (JA B-48). Less than one percent of this total are undocumented children.

The evidence further reflected that the Plaintiffs in particular and undocumented aliens in general contribute to the tax base of the schools in the same manner as other parents. It was uncontested that local funds for schools in Texas are primarily derived from property taxes which are paid by undocumented persons either directly or as part of a rental payment. Thus, like all other persons in a community, these parents contribute to the local tax base. State contributions to schools come directly and indirectly from consumer taxes (P. Ex. 6, Dec. T. 127, JA B-90). Undocumented alien parents pay these taxes just as do all others.

Witnesses for both the Plaintiffs and the State testified that undocumented children are educationally similarly situated to their citizen and permanent resident classmates.[11] Like all children some are smart, some less so;

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[9]Children born of undocumented immigrants in the United States are United States citizens. One of the many perversities of this Legislation is that eligibility for schooling frequently will be different for different members of the same family; in fact, each of the named Plaintiffs has a brother or sister who is, or will be (when of age), eligible to attend school tuition-free (JA A-4, A-12, A-23, A-26).

[10]See e.g. JA B-6, B-15, B-56.

[11]JA B-38, B-76-77, B-89.

some may be exclusively Spanish speaking while others may, as a result of a lifetime in the United States, be monolingual English speaking. In sum these children are as heterogenous in their needs and abilities as any other group of children.[12]

The uncontradicted testimony reflected that these children are likely to remain in the United States whether or not they are educated by the State of Texas.[13] This is likely given the limitations of the Immigration and Naturalization Service (INS), the necessity that the parents remain due to their desperate economic condition, and the ultimate likelihood that the children will be able to adjust their status through one procedure or another.[14] Thus, most of these children, who have no control over their place of residence, are likely to remain in the United States unassimilated and illiterate should Section 21.031 be upheld. As witnesses for both the State and the Plaintiffs observed, the denial of schooling to these children virtually eliminates any chance these children have to lead meaningful productive lives.[15]

In her opening statement, the Attorney General set forth her understanding of the rationale for the Legislation. She stated, "We will attempt to show that there is a detrimental impact on other students due to cost factors. There are cost factors in terms of lost textbooks, removed textbooks, problems you would not have with the average student".[16]

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[12]*Id.* The State asserts in their brief that undocumented persons generally have no formal education and are of "lower educational capabilities". This testimony concerned *adults* from Mexico and, at least as respects "capability" was vigorously contested. See e.g. JA B-17, B-65. Testimony referred to as showing "overageness" was shown on cross-examination to refer to legal migrant children (JA B-76-77).

[13]JA B-6, B-42, B-57, B-60-62.

[14]See e.g. JA B-6, B-11, B-65. See also JA B-56-57.

[15]JA B-41-42, B-68-69.

[16]JA B-47-48.

Two witnesses were presented by the State to buttress their contention that the inclusion of undocumented children would have a detrimental impact on the educational system. Mr. John Eaton, Deputy Superintendent of the Houston Independent School District (HISD), gave his opinion that the addition of large numbers of students to a school system could result in a reduction of services to other students. Specifically he hypothesized that the addition of these students could result in increased class sizes.[17] On cross-examination Mr. Eaton agreed that pursuant to the State funding formula a district receives funds for an additional teacher for approximately each additional twenty (20) students (JA B-75). He also hypothesized that some of these students would need bilingual assistance[18] and that undocumented students frequently were entitled to supplemental programs which added costs to their education.[19] He agreed that most of these costs are borne by the Federal Government.[20] He also conceded that his projections of educational need were based upon his experiences with migrant children who might or might not have been undocumented.[21]

The second witness presented by the State to show detrimental impact was Jim Bob Hensley. Dr. Hensley, an employee of a State funded regional service center, presented a study which showed that school districts at the border tend to be overcrowded and that the border districts do not have bilingual programs at upper grade levels to meet the linguistic needs of older immigrant students.[22]

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[17]JA B-71-72.
[18]JA B-71-73.
[19]JA B-70.
[20]Dec. T. 275.
[21]JA B-77.
[22]JA B-98-107.

On cross-examination Dr. Hensley agreed that the study dealt with the effects in districts of the presence of legally admitted aliens and did not discuss any particular problem caused by undocumented children.[23]

Tyler officials testified that as a result of the preliminary injunction and the consequent return of Plaintiffs to their schools the number of students needing bilingual assistance totaled over twenty in two grades, triggering the State requirement that certified bilingual teachers be employed in the district's existing bilingual program.[24] This was the only evidence of impact upon the Tyler schools and the Tyler Superintendent agreed it was "desirable" (JA B-45).

Finally, there was uncontradicted testimony that the effect of Section 21.031 was to *reduce* resources to districts with undocumented children rather than expand them, thus undermining a primary justification presently advanced for this Legislation. This occurs because the primary trigger of State funding is an individual student count.[25] Simply, districts forced to deny an education to undocumented children lose State funding for those children while being unable to reduce costs proportionately.[26] This phenomenon was affirmed by both the Tyler Superintendent and Business Manager.[27]

The facts, in sum, present a one-sided picture. Innocent children are being reluctantly denied an education by local school districts because the State has closed the doors of the State Treasury. No benefit was shown or could be shown to accrue to those children remaining. An obvious and irreparable harm is being visited upon those children

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[23]JA B-87.

[24]JA B-45.

[25]JA B-27-34, B-73-75.

[26]JA B-31, B-33-34.

[27]JA A-51, B-43-44.

who comprise the Plaintiff class; ultimately, this harm will fall upon the State and the Nation. The evidence reflects that this legislation is irrational. Each of the lower courts has so found and thus all children are presently attending school.

SUMMARY OF THE ARGUMENT

I. Although this Court has never had the opportunity to directly rule on the issue, the plain meaning of the Equal Protection Clause, its legislative history, this Court's interpretation of its companion, the Due Process Clause, and logic compel recognition that undocumented children are covered by its protections.

The Equal Protection Clause prohibits a State from denying equal protection to "Any person within its jurisdiction". This command contrasts starkly with the Privileges and Immunities Clause which immediately preceeds it and which provides protection for "Citizens of the United States". The Due Process Clause which also protects "persons" has repeatedly been interpreted by this Court as providing protection for undocumented aliens. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Both legislative history and logic support a ruling that a "person" protected by the Due Process Clause is also a "person" for equal protection purposes. Clearly a government that operates on a rule of law cannot tolerate the irrational and arbitrary treatment of persons within its border. Such would be the consequence of the denial of coverage under the Equal Protection Clause.

II. The outcome of this case does not depend upon the standard of equal protection review. The only standard by which this Legislation could be upheld would be one of passive acceptance. By excluding undocumented children to achieve speculative benefits for others, the State is merely making a decision based upon its notion of who is

"deserving" rather than upon any objective factors distinguishing these children and those it permits to receive an education. As the Court below observed, "In light of the application of the Equal Protection Clause, however, Texas may not justify its discrimination by a mere desire to discriminate." *Doe v. Plyler*, 628 F.2d 448, 460 (1980); see also *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

Properly viewed, however, the denial of education to these innocent children must be measured against a heightened standard of review. First, the *absolute denial* of schooling to these children denies them a fundamental right. This case is thus distinguishable from *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), in which a *relative*, speculative deprivation was held not to justify heightened scrutiny. Education, like freedom of speech and equality of access to the ballot is preservative of the rights and liberties which serve as the bedrock of this Nation. The Founders of the Nation recognized that unless the populace had some quantum of education the Nation could not long survive. What was true in the Eighteenth Century is even more so in today's world, and is no less true when the deprivation is suffered by undocumented children.

Secondly, heightened scrutiny is appropriate whenever a State chooses to punish individuals for wrongs committed by others. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). If a wrong has been committed here it is the wrong of a financially desperate parent seeking to make a living and to preserve his family's unity. If this be wrong, surely the child who has no say nor control over his residence should not be the recipient of so unfair and drastic a punishment.

Finally, heightened scrutiny is appropriate for this harm is being visited upon children whose parents are unable to protect their interests through the political process. *Graham v. Richardson*, 403 U.S. 365 (1971).

III. Section 21.031 further conflicts with and frustrates the purposes of Federal Education policy. That policy is to assist those students who are most in need, recognizing that low academic achievement is often related to poverty. That policy, primarily articulated in the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 2701 *et seq.* has been reenacted in approximate four (4) year cycles since 1965, frequently at times when immigration policies were being roundly debated in Congress. Undocumented children, many of whom are known to be poor and to be in need of the programs provided by the ESEA, have never been denied those benefits.

ARGUMENT

I

UNDOCUMENTED CHILDREN ARE PROTECTED BY THE EQUAL PROTECTION CLAUSE

Section One of the Fourteenth Amendment states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

By its express terms the Equal Protection Clause protects "persons". There are no modifiers of the word "person" which would exclude undocumented aliens. Conversely the Privileges and Immunities Clause, found also in Section One of the Fourteenth Amendment, expressly limits its protection to "citizens".

The Congressional debate surrounding the adoption of the Fourteenth Amendment establishes conclusively that this distinction was not accidental. It further suggests that the framers of Section One viewed the majestic promises of the Due Process and Equal Protection Clauses

as basic and interrelated and protective of whomever should step upon our soil. Finally, the debate suggests that the protective umbrella of the Due Process and Equal Protection Clauses was fashioned to cover an identical class of persons.

The Fourteenth Amendment evolved from a joint House-Senate Committee known as the Joint Committee of Fifteen on Reconstruction. While that Committee considered various versions of what would come to be known as the 14th Amendment, "Two classes of persons were recognized in all the resolutions."[28] To "citizens" were accorded Privileges and Immunities; "To the other class designated as 'persons' was to be secured equal protection in the right of life, liberty and property."[29]

Representative John Bingham of Ohio, a member of the Committee, is generally considered the author of Section One. During the floor debate in the House just prior to passage Rep. Bingham construed Section One as being designed "to protect by national law the Privileges and Immunities of the citizens of the Republic and the *inborn rights of every person within its jurisdiction* whenever the same shall be abridged or denied by the unconstitutional acts of any State."[30] Later in the debate Rep. Bingham observed "That great want of the *citizen and stranger*, protection by national law from unconstitutional State enactments is supplied by the first section of this amendment."[31]

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[28]H. Flack, "The Adoption of the Fourteenth Amendment" (1908) at 63-64.

[29]*Id.*

[30]39 Congressional Globe, 1st Section 2542 (May 10, 1866) (Emphasis added).

[31]*Id.* at 2543 (Emphasis added). The reference to the "stranger" obviously referred to the sentences containing the Due Process and Equal Protection clauses as the Privileges and Immunities Clause was applicable only to "citizens".

Senator Jacob Howard was the floor manager of the Amendment in the Senate as well as a member of the Committee of Fifteen. During the Senate floor debate preceding passage Senator Howard presented the "views", "motives" and "aims" of the Committee in approving the amendments.[32] Senator Howard described the construction that the Committee put upon the Equal Protection and Due Process Clause as follows:

> The last two clauses of the First Section of the Amendment disable a State from depriving not merely a citizen of the United States, but *any person, Whoever he may be* of life, liberty or property without process of law *or* from denying to him the equal protection of the laws . . . It will, if adopted by the States forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction.*[33]

No member of the Committee challenged Senator Howard's construction of its intent and the amendment was approved immediately thereafter.

These statements of the original meaning of the Amendment by its author and floor managers provide assurance that even "the stranger" was deemed protected by the Equal Protection Clause.[34] They also reflect that the Due

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[32]39 Congressional Globe, 1st Section 2765 (May 23, 1866).

[33]39 Congressional Globe, 1st Section 2766 (May 23, 1866) (Emphasis added).

[34]"There was, of course, no such thing as an "undocumented alien" at the time of the consideration of Section One. However, both the expressions of the fundamentality of the Equal Protection and Due Process clauses and the desire to provide those basic protections to even the "stranger" or one "who may happen to be within the jurisdiction" compel a conclusion that its sweep is territorial and not predicated upon status.

Process and Equal Protection Clauses were considered one basic fundamental package that protected an identical group of "persons." Due Process is not discussed separately from equal protection. Indeed they are seen as advancing jointly "inborn and fundamental rights."[55]

This Court has repeatedly ruled that the Due Process Clause protects undocumented persons who are within the territory of the United States. *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1902); *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Neither the language of the Equal Protection Clause nor its history permits of a different construction of that clause.

While this Court has never ruled expressly on this matter, it has acknowledged the commonality of coverage between the Due Process and Equal Protection clauses. Notably it chose to do so in the seminal case establishing coverage of undocumented aliens by the Due Process Clause. As this Court observed in *Wong Wing v. United States*, 163 U.S. 228 (1896):

> . . . [I]n the case of *Yick Wo v. Hopkins*, 118 U.S. 369, it was said:
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> "The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'. *These provisions are universal in their application to all persons within the territorial* jurisdiction, without regard to any difference of race, of color or

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[55] *Supra*, n. 44 & 47. There is *no* historical basis for the suggestion that the Due Process Clause is somehow more basic than the Equal Protection Clause; any such distinction would have to be woven of whole cloth. This notion was expressly rejected by the Court below. *Doe, supra*, 628 F.2d 448, 456 n.18.

> nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

163 U.S. at 238 [Emphasis added].

More explicitly, Justice Field in his concurring opinion observed:

> . . . [T]he term "person" used in the Fifth Amendment, is broad enough to include *any and every human being within the jurisdiction of the republic.* A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.

163 U.S. at 242.

In an earlier ruling, this Court recognized that even those who are transitorily within the country are bound by its basic laws and in turn are protected by them. In *Carlisle v. United States*, 16 Wall. 147, 154 (1872) this Court noted:

> "The rights of sovereignty", says Wildman, in his Institute on International Law, p.40, "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. *All strangers are under the protection of the sovereign while they are within his territories*, and owe a temporary allegiance in return for that protection." [Emphasis added].

See also *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).[38]

While lower Courts have had few occasions to rule on this matter, those that have agree that undocumented persons are persons within the meaning of the Equal Protection Clause. *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2nd Cir. 1975), *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D. V.I. 1971).

Clearly the protections provided by the Equal Protection Clause are as basic and fundamental as those of the Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Congress that enacted the clauses saw them as one basic promise of freedom from arbitrary treatment. Subsequent history does not diminish the fundamental role of the Equal Protection Clause in assuring such treatment.

Further a ruling that undocumented persons were not persons within the meaning of the Equal Protection Clause would lead to results at odds with the most fundamental principles of this Nation. It would permit States to treat undocumented persons within its jurisdiction arbitrarily and irrationally, free from any need to justify such treatment. Quite apart from its international implications, a ruling which places an imprimatur of acceptability on State action which is arbitrary and irrational does the most serious violence to the rule of law which must serve as the bedrock of any legitimate Constitutional system.

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[38]The State and several Amici note that Justice Jackson in *Johnson* spoke of an "ascending scale of rights" available to persons of different status. 339 U.S. at 770. Should such a scale exist, it does not answer the question posed here, specifically, are undocumented residents of the United States provided coverage under the Equal Protection Clause? It is also misplaced to argue that the determination of this issue in the affirmative will compel the allocation of every benefit imaginable to undocumented persons. Mere coverage under the Equal Protection Clause is just the beginning of the inquiry, not its end. Cf. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

In sum, the wording of the Fourteenth Amendment, its legislative history, the case law and common sense support a holding that undocumented aliens are protected by the Equal Protection Clause.

II

A STATE STATUTE WHICH DENIES EDUCATION TO UNDOCUMENTED CHILDREN MUST BE STRICTLY SCRUTINIZED

Statutes which impinge upon a fundamental interest or which disadvantage a suspect class must be strictly scrutinized. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

> [A]s previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification", that the State must demonstrate that its educational system has been structured with "precision", and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives . . .

411 U.S. at 16-17 (footnotes omitted).

While the denial of schooling to undocumented children fails to meet even the most relaxed standard of review, strict scrutiny is compelled by the facts of this case. First, the absolute denial of any schooling denies these children a fundamental interest. Secondly, the imposition of one of the harshest punishments imaginable upon innocent children for the acts of their parents is violative of fundamental precepts enbodied in the Constitution. Finally, the use of an alienage classification compels use of heightened scrutiny. While rote adherence to this Court's alienage decisions is not suggested, the principles underlying those decisions compel a scrutiny greater than is invoked in reviewing non-suspect classifications.

A. The Absolute Exclusion From Public Schools Denies Children Access To A Fundamental Right

In *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), this Court ruled that the relative inequalities occasioned by the Texas school financing scheme were not to be given strict scrutiny. In rejecting the request that this Court consider any disparate treatment in the provision of educational programs to be subject to such scrutiny the Court observed,

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and whereas is true in the present case no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

411 U.S. 36-37.

This case presents the question that was left open in *Rodriguez*. Alone among all the States, Texas has chosen to exclude a class of children from its public schools because of their status. The harm to society as well as the harm to these children of absolute exclusion demands that the State's justification meet the standards of strict scrutiny.[37]

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[37]It is suggested by the State that no exclusion exists because the children could return to school in Mexico. This ignores the fact that these children do not control their own place of residence and that their parents, faced with harsh economic choices, will in many instances remain in this Country notwithstanding the impact on their children. (JA A-33-34). Further, many of these children have been in the United States for a number of years and know of Mexico only as the children of other immigrant groups-through

It is not necessary, as this Court observed in *Rodriguez*, that a right be explicitly mentioned in the Constitution to be considered fundamental. "Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.* at 34-35. Nor is it necessary to ascribe the right to a particular constitutional provision. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), this Court ruled equal access to the franchise to be fundamental "because preservative of all rights." Likewise, First Amendment rights are deemed fundamental because "so important to the preservation of the freedom treasured in a democratic society." *Cox v. Louisiana*, 379 U.S. 559, 574 (1964) and because "[T]herein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Although not expressly mentioned in the Constitution it is clear that the Nation's Founders similarly perceived some minimal quantum of education to be preservative of all rights, and necessary for the preservation of the security of the Nation. This Court noted in *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972):

> as Thomas Jefferson pointed out early in our history, some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.

Benjamin Franklin observed that "the good education of youth has been esteemed by wise men in all ages, as the surest foundation of the happiness both of private families and commonwealth."[38]

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legends. Finally, if this notion were accepted, it would provide the perfect response to any State denial of equal protection, "Go to a State where no such denial exists."

[38]B. Franklin, "Proposals Relating to the Education of Youth in Pennsylvania" (1749); reprinted in *Social History of American*

Benjamin Rush, a signer of the Declaration of Independence and a participant in the Constitutional Convention drew the connection between education and preservation of a republican form of government:

> Freedom can exist only in the society of knowledge. Without learning men are incapable of knowing their rights, and where learning is confined to a few people, liberty can be neither equal nor universal.[39]

Indeed, as Chief Justice John Marshall observed, "In governments entirely popular" general education "is *more indispensable* . . . than in another."[40]

Justice Brandeis summarized this concern of the Founders in *Whitney v. California,* 274 U.S. 357 (1927). As Justice Brandeis observed, "Those who won our independence believed that the final end of this state was to make men free to develop their faculties." 274 U.S. at 375-76 (Brandeis concurring).

This Court's recent ruling in *Ambach v. Norwick,* 441 U.S. 68 (1979) reiterates and expands upon the concept that some quantum of education is indispensible to the preservation of our free society. In upholding a citizenship requirement for public school teachers this Court noted that "[P]ublic school teachers may be regarded as performing a task 'that go[es] to the heart of representative government'." *Ambach, supra,* at 75-76 citing *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). The Court further observed that "public education, like the police function, fulfills a most fundamental obligation of govern-

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Education, Volume: Colonial Times to 1860, (Vassar, Rand McNelly & Co.).

[39]B. Rush, "Education Agreeable to a Republican Form of Government" (1786); reprinted in *Social History of American Education, Volume: Colonial Times to 1860,* (Vassar, Rand McNelly & Co.).

[40]Letter of John Marshall to Charles Mercer, April 7, 1827; reported in A. Beveridge, "The Life of John Marshall", Volume IV, p. 472. (Emphasis added).

ment to its constituency." *Id.* at 76, citing *Foley v. Connelie*, 435 U.S. 291, 297 (1978), and finally concluded that the Court's observation of the fundamental nature of education was a shared view:

> These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

Ambach, supra, at 77 (citation omitted).

This recognition of the fundamental nature of education rests upon the fact that *society* cannot long survive without an educated populace. A second, more individualistic, foundation also compels such a recognition. When public schooling is available to all but the children of one excluded class, the members of that class are inexorably relegated to a low station in life, subject to exploitation and removed from the meaningful discourse of the day. As one is properly and regularly reminded, "A mind is a terrible thing to waste."

In a simpler time of history it might have been possible to argue that some level of public schooling was not essential to the fulfillment of the promise in our Declaration of Independence that "all men" are entitled to "life, liberty and the pursuit of happiness",[41] it was not until the latter half of the Nineteenth Century that free public schooling became universally available.[42] Once made universally available, the denial of schooling to a discrete class of children or to a given child effectively cripples his ability to compete for the fruits of a free society.

Society was also simpler in the early Nineteenth Century. Access to schooling was not as essential to the

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[41]The Declaration of Independence "The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States" G.P.O. (1877).

[42]D. Tyack, "The One Best System: A History of American Urban Education", Harvard University Press, Cambridge, Mass. (1974) pp. 66-67.

opportunity to survive and prosper. By 1954, this Court observed, however, that

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

This observation is even more appropriate twenty seven (27) years later in an increasingly complex world.[43] The exclusion of a child from any access to elementary or secondary education in the context of 1981 is an affirmative act by the State limiting the child's life chances sub-

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[43]No stronger testament to the recognition that some form of schooling is viewed as basic to an ordered liberty is the fact that, with three exceptions every State Constitution in the Union provides for the right of free public elementary and secondary education. See Ala. Const. art. XIV, § 256; Alaska Const. art. VII, §1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VII, § 1; Del. Const. art. X, § 1; Fla. Const. art. XII, § 1; Ga. Const. art. VIII, § 2-6401; Hawaii Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 12; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. XII; Me. Const. art. VII, § 1; Md. Const. art. VII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Min. Const. art. VIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 6; Nev. Const. art. XI, § 2; N.H. Const. pt. 2 art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art XII, § 1; N.Y. Const. art. XI, § 1; N.C.. Const. art. IX, § 2; N.D. Const. art. VIII, § 147; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Ore. Const. art. VIII, § 3; Pa. Const. art. I, § 14; R.I. Const. art. XII, § 1; S.D. Const. art. XIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 64; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art VII, § 1. Three States, Alabama, Mississippi and South Carolina removed similar provisions from their Constitutions in an effort to evade this Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954).

stantially. Nothing is more basic to the concept of liberty embodied in the Constitution than the right to be free from such a governmental allocation of life chances. *Whitney, supra,* at 375."

In apparent recognition that some quantum of education is fundamental, the State nevertheless chooses to argue that schooling is not fundamental for undocumented children. They argue that since undocumented children will be unable to vote or hold office their education is unnecessary to the preservation of the rights upon which this Country is founded. They also argue that since undocumented persons are prohibited from employment they have no liberty interest in the freedom to develop their capabilities. These arguments are based upon a basic misunderstanding of why education is fundamental.

As the above-cited authorities make clear, the fundamentality of an interest is predicated upon the closeness of its relationship to the preservation of the Nation and only incidentally upon the meaning of its deprivation to the individual Plaintiff. In *Dunn v. Blumenstein,* 405 U.S. 330 (1972), for example, this Court measured a durational residency requirement for voting against strict scrutiny. While no doubt Mr. Blumenstein endured some suffering by having to wait one year to vote in Tennessee it was not that impact on him or the class he represented that led to such review; rather, strict scrutiny flowed from the fact that this was an incursion upon an interest deemed preservative of our society, the right to vote. Similarly, the fundamentality of education cannot, nor should it be, dependent upon the vicissitudes of who is asserting it. The peril to the Nation is the same whether the State deems to exclude undocumented children or some other class. In

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"The prohibition of titles of Nobility in the Constitution is but one manifestation of the intent by the framers of the Constitution to assure that one's life chances are not determined by one's status, Article I § 9(8). See also The Federalist Papers, #39, p. 242, Mentor Books, New York, (1961).

either event the State reaps a harvest of intellectually inert, illiterate, unassimilated and invariably hostile persons. *Cf. Whitney v. California*, 274 U.S. at 375-76.[45]

In any event, it is much too narrow to view the political preservation of a society or even the political participation of an individual as being focused exclusively on the ballot box. It cannot be said that the only "political act" is one of voting or holding office. The individual in our society, whether he resides here lawfully or unlawfully, has a variety of contacts with the body politic and more particularly has rights that he is entitled to exercise. Minimally these include those rights granted under the Due Process Clause. *Mathews v. Diaz, supra.* The exclusion from schooling and the relegation to illiteracy make a mockery of this Court's recognition of those rights.

Nor does the Federal Government's prohibition against employment by undocumented persons justify a State policy which effectively relegates these children to a state of serfdom. The freedom implicit in the Constitution from governmental determinations of life status is not answered by suggesting that undocumented persons cannot be employed. The record first underscores the fact that most of these children will grow up and be employed in the

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[45]In their brief, the State argues correctly that the mere importance of an interest does not justify its recognition as fundamental, citing *Lindsey v. Normet*, 405 U.S. 56 (1972) and *De Canas v. Bica*, 424 U.S. 351 (1976). The State suggests that since neither housing nor employment has been declared a fundamental interest, there is no basis for recognizing some quantum of education as fundamental. Even assuming that *De Canas* held that there was no "right of employment" (an incorrect assumption as that was not the issue in the case), compelling reasons suggest that some quantum of education is fundamental although access to those others interests may not be. First, as reflected above, the authors of the Constitution recognized the nexus between a minimal level of education and the preservation of the Republic. Secondly, the impact of education upon the meaningful exercise of First Amendment rights and broad participation in the political process is direct and unambiguous. The same cannot be said for those other two interests.

United States either before or after adjusting their status (see generally JA B-7-8; JA B-56-59; JA B-61-62. Wherever a given child may ultimately reside he will carry the badge and scare of State exclusion with him.

The record further reflects that the denial of education to undocumented children is likely to be more devastating to both them and society, than the exclusion of generally less disadvantaged children. As Jose Cardenas, a prominent Texas educator and a witness for the Plaintiffs testified

> Well, I think that a child from an affluent family may have the resources for providing employment either with the financial resources available to the family or else be able to move into some kind of position that would be not available to a person that would come from a poor background. Mexican-American, because Mexican-Americans are more systematically excluded from the higher-paying positions in most areas of Texas employment, and Texas, because I think that Texas, as described earlier by another witness, the ethnic or racial strife in Texas is, perhaps, more acute than it has been in other States, so, in general, a poor Mexican-American in Texas would be very severely hampered by the lack of an education.

JA B-42.

Not mentioned by Dr. Cardenas was the socializing role of the public school and its especial importance for immigrant children. The public school provides virtually the only opportunity that many of these children will have to interact with the majority society and to learn of the history and culture of the Nation. As noted by this Court in *Ambach v. Norwick*, 441 U.S. at 77, public schools serve as "an assimilative force by which diverse and conflictive elements in our society are brought together on a broad but common ground." The exclusion of these undocumented children from access to the public schools will assure that

they not be brought together, but rather remain isolated, illiterate outlaws, ignorant of the customs and foundations of the Country.

In sum, the strength of this Court's precedents and logic compel a holding that education is fundamental for all children and that the absolute denial of any schooling needs be subjected to strict scrutiny. As discussed in Section III, *infra*, this legislation fails to meet even a relaxed standard of review. It certainly cannot survive strict scrutiny.

B. Legislation That Visits The "Wrongs" of Parents On Their Innocent Children In Such A Drastic Manner Is Deserving of Heightened Scrutiny

The undocumented status of the children who comprise the Plaintiffs' class is a status for which those children are not responsible. They were brought here by their parents. As children, they have neither the power nor the right to determine their place of residence;[16] today, because of their residence, Section 21.031 denies them an education—a service universally recognized as basic to a child's development.

It is as fundamental that "in our jurisprudence guilt is personal" *Scales v. United States*, 367 U.S. 203, 224 (1961); *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Healy v. James*, 408 U.S. 169, 185-86 (1972).

In *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) the Court struck down a school board regulation which permitted the suspension of students for the misconduct of their parents; that Court observed,

> Freedom from punishment in the absence of *personal* guilt is a fundamental concept in the American

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[16] In *Arredondo v. Brockette*, 648 F.2d 425, 431 (5th Cir. 1981), the Court noted, "Under Texas common law a minor is 'not *sui juris* and can neither select nor change its domicile, which is fixed by law as that of its father.' *Smith v. Ansley*, 257 S.W.2d 156, 157 (Tex. Civ. App.—Waco 1953, Writ ref'd n.r.e.)."

> scheme of justice. In order to intrude upon this fundamental liberty governments must satisfy a substantial burden of justification . . .
>
> . . . Traditionally, under our system of justice punishment must be founded upon an individual's act or omission, not from his status, political affiliation or domestic relationship. [footnote omitted; emphasis in original]

In *Lalli v. Lalli*, 439 U.S. 259, 265-266 (1978) this Court ruled that classifications involving illegitimate children must be "substantially related to permissible state interests" and "carefully tuned to alternative considerations." Citing *Trimble v. Gordon*, 430 U.S. 762, 772 (1977). The primary basis for this heightened standard of scrutiny of illegitimacy classifications is that they punish children for a status for which they bear no responsibility.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court explained its basis for striking a Louisiana statute which denied certain illegitimate children the right to equal access to worker's compensation death benefits:

> The status of illegitimacy has expressed through the ages society's condemnation of responsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is *contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.* Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. at 175 (footnotes omitted; emphasis added). See also *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee Co.*, 390 U.S. 73 (1968).[17]

[17] It is argued by the State that the immutability of the status of illegitimate children distinguishes them from the instant Plaintiffs.

Like the illegitimate child in *Trimble v. Gordon*, 430 U.S. 762 (1977) one can say of these undocumented children that

> The parents have the ability to conform their conduct to societal norms but their children can affect neither their parents conduct nor their own status.

430 U.S. at 770.

When measured against this middle level of scrutiny this legislation must fall. Surely this legislation, in its purported goal of limiting unlawful immigration bears "only the most attenuated relationship to the asserted goal". *Trimble, supra,* at 768. Witnesses from all parties agreed that the enticement of education is of minimal consequence in stemming undocumented immigration (see e.g. JA A-33, B-6, B-65). As is more fully discussed in the next section the removal of undocumented children from school districts does not reallocate resources to needy school districts and surely is not "carefully tuned to alternative consideration". *Trimble* at 772. In sum, this legislation fails to meet the standard appropriate for review of classifications that penalize the innocent for the acts of others. The undocumented children in this case are being so punished.

To the extent that these cases rest upon immutability such is not a distinguishing feature. These children have no power of their own to remove the disability by changing their residence. Thus for them the situation may be absolutely immutable. In any event, immutability has never held the cornerstone for according heightened scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 9, n.11. See also *Parham v. Hughes*, 441 U.S. 347 (1979), in which this Court upheld an illegitimacy classifier that precluded benefits to the *father* of the child, distinguishing *Trimble, supra,* and *Weber, supra,* on the ground that "*the basic rationale* of these decisions is that it is unjust and ineffective for society [to punish the] child who is in no way responsible for his situation and is unable to change it." *Parham, supra* at 352. [Emphasis added]

C. Heightened Scrutiny Is Appropriate for Alienage Classifications

The very uniqueness of this unprecedented exclusion of these children provides a stark reminder of the reasons that this Court has reviewed with special scrutiny discrimination against aliens. While this Court's recent decisions lowering the level of scrutiny for alienage classification which have a political nexus might suggest that this alienage classification *per se* does not justify strict scrutiny, a passive review of the classification would do gross violence to the principles that underlie the alienage decisions. As observed in the seminal "Strict Scrutiny" case:

> prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for correspondingly more searching judicial inquiry.

U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

Legislation such as Section 21.031 with its gross disparity between the questionable benefits to those remaining in schools and its unquestioned calamity to the Plaintiff children can hardly be imagined visited upon any but the most politically powerless.

The primary underpinning of *Graham v. Richardson*, 403 U.S. 365, (1971) and its progeny, *Sugarman v. Dougall*, 413 U.S. 634 (1973), *In Re Griffiths*, 413 U.S. 717 (1973), *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), and *Nyquist v. Mauclet*, 432 U.S. 1 (1977) is the recognition that aliens are politically powerless and that lack of power has traditionally occasioned arbitrary scapegoating. If the premanent resident aliens referred to in those decisions suffer such disability those who are subject of this legislation suffer it ten-fold. The permanent resident alien can at least speak out and lobby his cause. The undocument alien must suffer injustice silently. Indeed the

very lack of cases brought by undocumented persons under the Equal Protection Clause is a manifestation of their inability to avail themselves of basic legal processes."[48]

If further proof of this need for heightened judicial protection be necessary, the record provides it. The testimony of Prof. Gilbert Cardenas of the University of Texas traces the cyclical patterns of encouragement of illegal immigration to this Country for the purpose of obtaining cheap labor and then resort to brutal deportation efforts during time of economic distress.[49] The testimony documents that it has been a traditional pattern to accept the toil and taxes of undocumented persons but to deny them access to basic services.[50]

The State argues that we are not here confronted with an alien-age classification but rather one of "residency."[51] They argue that an undocumented person cannot become a resident and that residence requirements are permissible. *Vlandis v. Kline*, 412 U.S. 441 (1973). The argument is circular. If undocumented children are "persons within the jurisdiction" for purposes of the Equal Protection Clause

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[48]See e.g. Ortega "The Plight of the Mexican Alien" 58 ABAJ 211 (1972).

[49]JA B-1-8.

[50]See generally the testimony of Prof. Gilbert Cardenas (JA B-1-8) and that of Marion Houstoun (JA B-13-25). The existence of such exploitation, for example, led the Mexican government to refuse to include Texas in the bracero program between 1943-47. See R. Acuna, "Occupied America", Canfield Press, San Francisco, 1972, pp. 169-170; See generally O. M. Scruggs, "Texas and the Bracero Program", Pacific Historical Review, August 1962.

[51]One amicus, The Legal Foundation of America, argues that no alienage classification is at issue because of a regulation that they imply the Texas State Board of Education adopted and which purportedly would permit a child to attend school if his parents applied for legal status. The regulation was proposed for adoption on March 20, 1980, but has *not* been adopted.

the State cannot say that they are not residents because of their status. "If a state wishes to borrow a Federal classification it must seek to rationalize the adopted distinction in the new setting . . . The state's use of the distinction must stand or fall on its own merits." *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy concurring); *Takahashi v. Fish Comm'n*, 334 U.S. 410 (1948). Many of the children affected by this legislation, including the named Plaintiffs meet any legitimate residency test as they have been in the State and in their school district a number of years. They cannot be stripped of that by the State adoption of a Federal classification. For children who are *not* residents, a school district has the unquestioned authority to deny them admission. *Arrendondo v. Brockette*, 648 F.2d 432 (5th Cir. 1981). For those who are residents, an irrebuttable presumption of non-residency based upon their Federal status is impermissible. *Vlandis, supra.*

In sum, heightened scrutiny is an appropriate measure of this legislation. Heightened judicial solicitude for those who are politically powerless is a tradition based upon a solid foundation that is not broken by the mere fact that these aliens are undocumented.[52] Application of heightened scrutiny compels a ruling that Section 21.031 is unconstitutional.

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[52]The State argues that it would offend some equitable notion if classifications affecting undocumented persons were subject to heightened scrutiny, while classification of some others did not receive such a review. This misapprehends the role of heightened scrutiny. Such scrutiny of suspect classes is not designed to give those classes an elevated position in the eyes of the law; rather it is founded upon the recognition that the classifier is frequently based on an irrelevant characteristic, such as race, or is the product of a one-sided political debate. See generally, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065 (1969).

III

DENIAL OF EDUCATION TO CHILDREN WHO ARE SIMILARLY SITUATED TO THEIR CLASSMATES IS NOT RATIONALLY RELATED TO A PERMISSIBLE STATE PURPOSE

The State offers two (2) justifications for this legislation in their brief to this Court. First, they suggest that the exclusion of undocumented children from school is a reasonable manner to allocate scarce resources. Secondly, they suggest that this legislation is permissible as a means of limiting immigration.[58] This section addresses the first contention. In Section IV will be addressed the second.

It is not disputed that some Texas school districts have problems. Some are underfunded, some are overcrowded and some are in need of bilingual teachers. Yet to single out undocumented children for exclusion as a means of solving these problems is merely to decide that certain children are "deserving" while others are not. Whether viewing these children and their families individually or as "undocumented," no feature distinguishes them from any other children.

Equal Protection requires some meaningful difference between those fenced out and those included; as observed by Justice Jackson in *Railway Express v. New York*, 336 U.S. 106, 115 (1949) (Jackson concurring):

> The Equal Protection Clause ceases to assure equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free . . . [T]he differentation must have an appropriate relation to the object of the legislation . . .

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[58]The justifications for this legislation change with every Court appearance. For example, in her closing argument on the hearing for preliminary injunction, the Attorney General flatly stated that "the basis behind our statute . . . [is] not an effort to control immigration" (JA A-63). In her opening statement at the Trial on the Merits she attributed the concern of the State to "costs in

The differentation between documented and undocumented bears no such relation. In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) this Court observed that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 413 U.S. at 534. In making the determination to deny schooling to these children based upon a notion of who is deserving and who is not, rather than any objectively distinguishable characteristic, the Texas legislature has fallen prey to either habit or political expendiency. Neither is sufficient justification for this legislation.

The facts in evidence show that: (a) Rather than reallocating resources to needy children in financially pressed school districts this legislation is likely to *reduce* financial resources available to those districts; (b) Undocumented children are likely to remain in the United States whether or not Texas provides them an education; (c) Undocumented families contribute to the school's tax base in the same manner as other parents; and (d) Educationally, the undocumented child is indistinguishable from his classmates.

Each of these facts, documented fully by the record, establishes that Section 21.031 is not a reasonable scheme to achieve the goals it allegedly advances.

A. A State Statutory Scheme Which Withdraws State Assistance From Local School Districts Is Not Reasonably Designed to Enhance the Financial Resources Available to Those Same Districts

The basic assumption underlying the opening statement of the State and advanced in its brief is that the statute

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terms of lost textbooks, removed textbooks, problems you would not have with the ordinary student" (JA B-48). This difficulty of the State's attorneys is understandable in light of the fact that no studies preceded the adoption of the statute, which adoption was accomplished by a voice vote without debate. *In Re Alien Children*, 501 F.Supp. 544, 555 n.19.

reflects an effort by the legislature to reallocate scarce economic resources for the educational benefit of children in districts burdened with problems. If this is what the legislature intended to do, it failed miserably.

This failure to achieve the purported goal can be traced to two factors, one, apparent on the face of the legislation, and the other, requiring testimony explaining the Texas school financing scheme.

Facially § 21.031 does not exclude undocumented alien children; rather, it denies local school districts access to the State treasury to cover the cost of their education. It further permits local school districts the right to exclude those children or to admit them on the payment of tuition.[54] In practice the legislation states, "We don't care what you do with undocumented children. However, if you do choose to educate them, don't look to us for help."[55] This hardly represents a reasoned effort by the State legislature to achieve the purported end of expanding resources available to school districts for the education of other children.[56]

While facially the statutory scheme reflected in section 21.031 is contradictory of its professed goal, it is important also to understand the somewhat hidden consequence of

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[54]In practice, of course, very few school districts could continue to educate these children without access to the State treasury or the imposition of tuition. All concede that most of these children come from impoverished conditions (JA A-53, B-8-10, B-16, B-66); thus, the choice to charge tuition is tantamount to exclusion (JA B-78).

[55]In her closing argument on the hearing for preliminary injunction the State's Attorney conceded as much; as she noted "The enforcement of this statute happens to be aimed at the Tyler Independent School District that does not collect money because these children cannot be included in the ADA, so they don't collect money from them, so if they're in school, the money comes out of the Tyler Independent School District's pocket. It doesn't come from the State treasury." (JA A-63).

[56]It is of interest that the State treasury had a surplus of one to two billion dollars in 1977 (JA B-93-97).

this policy. In order to appreciate these consequences, it is necessary to understand some basic facts about school financing in Texas.[57]

There are three (3) sources of school district income; federal, state and local. In Texas, approximately 55% of a school district's educational income is from the State, 38% is locally generated, and 8% derives from federal programs (JA B-32).[58] There are two (2) major aspects of State aid. First, the State contributes, through its foundation programs, a set amount to each school district for every student enrolled in the district. That sum is approximately $100 per student (JA B-33). More importantly, the foundation program also includes a formula which allocates money for a teacher for approximately twenty (20) children (Id.).[59]

The second aspect of the State aid is the equalization formula. This formula, designed to partly equalize funding between rich and poor districts, allocates State aid according to property wealth per average daily attendant students in school (ADA) (JA B-33-34).

While each of these formulas vary, there is one consistent factor which triggers State aid to a school district. That factor is average daily attendance (JA B-25-34, B-74-75). Stated simply, a school district loses money every time it excludes a student from its schools; and a poor school district loses more money than a wealthy one because of the equalization aspect of the State funding formula.[60]

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[57]This synopsis is taken from the uncontradicted testimony of Robert Firestine, a recognized expert in the area of school finance. See generally, JA B-25-34.

[58]These are average figures. In Tyler, the Superintendent estimated that 30% of their income was locally generated (JA A-51).

[59]The Deputy Superintendent of the Houston ISD indicated that "There's a division of 19 for grades K through three, 21 pupils four to six; 20 pupils seven to grade nine; 18 pupils ten to grade twelve." (JA B-75).

[60]Dr. Firestine explained this would "occur because as numbers of students that were counted in attendance in a school district

If the reduction of students and thus income were accompanied by a greater reduction in costs, additional resources might be available for other students. No evidence in the record shows that this is likely to occur; in fact, all evidence points to the contrary.

The expert testimony of Dr. Robert Firestine and the experiential testimony of the two school district administrators presented by the Defendants documents the fact that costs rarely are reduced as much as the loss of income. Dr. Firestine testified that administration costs and fixed maintenance constitute on the average twenty-five percent (25%) of current operating expenditures. With respect to these costs, he concluded, "We cannot presume that specific expenditures for maintenance operations and for administration would commensurately decline—that is, school buildings still have to be maintained in the usual way" (JA B-29).

Dr. Firestine also found that debt service would remain steady notwithstanding the drop of income due to exclusion.

Approximately sixty-eight percent of current public school expenditures are attributable to teachers and aides. Dr. Firestine testified that sizeable reductions in a given grade at a particular school are necessary before even one teacher can be released (JA B-30-31); even then, tenure provisions result in the release of less experienced, "cheaper" teachers and aides (JA B-30). In sum, even those costs which one would expect to be reduced commensurately with a reduction of students are not so reduced.

In concluding his testimony, Dr. Firestine was asked, "Given the formula based on students in attendance and given the intransigence of costs, is it possible that a State law which resulted in exclusion of certain students from

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were reduced, the school district would then appear to be more wealthy in terms of its property wealth per student. In that case, the district, as it appeared to become more wealthy, even though the actual property value in the district had not changed—its actual equalization would thereby be reduced." (JA B-33-34).

school could result in placing a school district in a greater financial squeeze than it was before?" His response was, "Yes, I think in general that would be true within the State and certainly it's true across the country." (JA B-34).[61]

The general validity of Dr. Firestine's analysis was supported by witnesses for the Tyler ISD and the State of Texas. Jim Plyler, the Superintendent of Tyler ISD, at the September hearing admitted the intractability of fixed costs (JA A-51); at the December hearing, Dick Lindsey, the Business Manager for the Tyler ISD, reaffirmed this conclusion, agreeing that, "You would, in fact, need a fairly significant number of students in a particular given grade or a given school before you could produce any savings by excluding children from school." (JA B-44).[62] Notwithstanding the alleged exclusion of 4,000-5,000 undocumented children in the Houston Independent School District (HISD) (out of 206,991) (JA B-70), the Deputy Superintendent could not point to any reduction in teachers (JA B-73), nor to any reduction in the bilingual program (JA B-73).

Likewise, it was necessarily conceded by all that State funds were triggered by student enrollment, that the exclu-

[61]Dr. Firestine did condition the conclusion on a "moderate decline" in enrollment. However, if one reads his entire testimony, it is clear that he meant that a moderate decline would be unlikely to be met with "commensurate" savings. See e.g. his testimony at JA B-29 in which he concludes that these two costs and debt service are "unaffected by declining enrollments."

[62]At the December hearing Mr. Plyler testified that the addition of the Plaintiffs through the preliminary injunction had "tipped" the number of students in the district who were in need of bilingual education over the threshold required by the State to establish a bilingual program (Dec. T. 151). On cross-examination it was conceded that of the three teachers who were hired to meet this need, (a) Not all three were required (JA B-45); (b) One was paid with federal Title I funds (JA B-46-47) and the other would be covered by the State through the foundation program (JA B-46), and (c) Most importantly, the establishment of the program had been a "desirable thing . . . to meet the needs of the youngsters." (JA B-45).

sion of students would result in the loss of income and any increase would be met with a substantial amount per student, including funds for a teacher "plus M and O" (maintenance and operation) for approximately every twenty children (JA B-45-46; B-74-75).

Thus, school districts in general and poor school districts in particular have had their financial resources squeezed rather than expanded by Section 21.031. If it was the purpose of the State legislature to expand resources available to school districts to aid those children considered deserving, it did not accomplish that result. The denial of ADA for undocumented students has achieved the opposite result for many school districts. This lack of nexus between the professed justification for this legislation and its consequences is expectable. Legislation which facially professes its disinterest in the education of innocent undocumented children by closing State coffers to those who choose to educate them is bound to hurt all children.[63]

B. Undocumented Persons Financially Support Schools on the Same Basis as Other Residents of Texas

It has never been permissible to tie access to State services to tax contributions. As this Court observed in *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969):

[63]The State in its brief on the Merits seeks to establish Brownsville as an example of a district which has been seriously impacted by undocumented children. Brownsville, was the only school district of approximately 1100 in the State that sought to avail itself of a stay pursuant to Justice Powell's order. In denying the stay the Court, in an unreported order, found that there were approximately 500 undocumented children in that district of a total of 27,120 students. It further held that while Brownsville certainly had many problems, they "would have been with the district in any case" *Brownsville Independent School District v. Certain Named and Unnamed Undocumented Alien Children*, #B 80-234 (S.D. Tex. Brownsville Div., filed Jan. 14, 1981). (Slip opinion, p. 8). The State in the instant case also tried without success to attribute the problem of the border districts to these children. Indeed their evidence reflected studies done *after* the exclusion of the children and showed that the problems had not been alleviated by their exclusion (JA B-87-89).

> [The State] may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. It could not, for example reduce expenditures for education by barring indigent children from its schools.

Nevertheless, it would seem to be an unstated foundation of this legislation that services can be withdrawn from those children because of their lack of tax contribution. Not only is such a rational legally impermissible, it rests upon a fallacious factual foundation.

It is uncontested that local funds for schools in Texas are primarily derived from property taxes. To the extent that undocumented alien parents own homes, they pay these taxes directly. Mr. Doe, one of the Plaintiffs, fits in this category (P. Ex. 6, Sept. T. 93). To the extent that undocumented alien parents rent, they pay property taxes through their rent. Thus, like all other persons in a community, these parents contribute to the local fund.[64]

State contributions to schools come directly and indirectly from consumer taxes, which are levied on diverse consumer goods. (JA B-90-92). Undocumented alien parents pay these taxes just as do all others.

The evidence also reflects that undocumented aliens generally pay social security and have federal taxes withheld from their wages. (JA B-18-19).[65] Thus, to the extent that

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[64]A given parent may pay more or less taxes than his neighbors. While of course, it would be impermissible to condition tuition on the size of the contribution, the evidence reflects no such effort (JA A-52).

[65]The State apparently does not dispute the tax contributions to state and local treasuries. They did present an opinion by Mr. Heston of the Immigration and Naturalization Service that many undocumented workers do not pay federal taxes (JA B-57-58). His ad hoc conclusions contrast sharply with the North-Houstoun study which reached a contrary conclusion. (JA B-18-19).

this legislation is founded upon an assumption that undocumented aliens do not contribute tax revenues to the schools it rests on a false assumption.

C. Undocumented Children Are Likely to Remain in the United States Whether Or Not They Are Educated

The State of Texas argues that it has no interest in educating those who will not remain in Texas. While certainly the State has the right to condition receipt of services on *present* residency, *Vlandis v. Kline*, 412 U.S. 441 (1973), the use of an irrebutable presumption that undocumented persons will not remain in the future is contrary to experience as reflected in the unrefuted testimony presented at trial. Indeed, absent resort to a sooth-sayer or an overly broad generalization as we have here there can be no principled substitution for a determination of bona fide *present* residence. The State, without need to resort to Section 21.031, already has the full capability to accomplish this task. *Arrendondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981).

Most importantly, this *post haec* justification for the legislation is defied by the facts. All witnesses agreed that the provision of education had little influence in the decision to come to this country or to remain. Economic considerations are the dominant factor. Shane Davies, an expert witness for the State was asked whether "the Texas policy of excluding the illegal alien child from free public education . . . affect[s] immigration." His answer was, "as an attractive index, No". (JA B-65).

Ronald Heston, Regional Director of the I.N.S. was asked by the Attorney General:

> Q. You say the main reason they come into the States is to obtain employment. In your dealings with the aliens who have come, those who have been undocumented or have been sent back, have you ever learned that there is a majority that are discouraged from coming into the State, because they don't have free education here for illegal aliens?

A. That are discouraged from coming because they don't have free education?

Q. Right, is that a big discouragement to illegal immigration?

A Not in my experience. This is not something I have encountered in my experience.[66]

Mr. Heston further observed that families with children of school age are very likely to be undetected. He stated, "From my experience and service experience, generally, they are excellent workers, work long hours: they go home and come back early the next morning . . . [G]enerally they stay away from Immigration Service, and especially those that have families here are not out to where their status may become known . . ." (JA B-57).

Possibly of even greater importance, today's undocumented person tends to become tomorrow's documented one. First, many of those who have been here for seven (7) years can readily adjust their status to permanent residency (JA B-61-62); secondly, for whatever reasons persons who spend their time in the United States as undocumented tend to become those persons who subsequently become documented; witnesses for the Plaintiffs and the State acknowledged that today's legal immigrant frequently was yesterday's illegal alien. In reporting on a study of legal immigrants from Cuba and Mexico that he had coauthored, Prof. Gilbert Cardenas testified, "Fifty or sixty percent of the sample had previous residence in the United States prior to legal admission." (JA B-6). See also testi-

[66]JA A-33-34. Having gotten this unexpected response from her own witness, the Attorney General did coax a statement from the witness that free schooling "wouldn't discourage" additional immigration. JA A-33-34. The State notes correctly in its brief that various witnesses observed that some parents might be "pulled" over the border by the attraction of education. However all witnesses testified that any pull would be speculative and certainly weak. (See e.g. JA B-6-7, B-65). The pull toward Texas is even more speculative given the fact that all other States provide free public education to all children.

mony of Jose Cardenas (JA B-42); Roland Heston, Regional Director for the Immigration and Naturalization Service, upon being asked whether some people now being admitted legally were here previously in an undocumented status states, "Oh, yes, that's true" (JA B-61).

Further, in addition to this evidence that the State merely spites itself (and other States to which these children may subsequently move as adults) by creating a cadre of illiterate residents, notice should be taken of the existence of pending federal legislation addressing these problems. The Carter administration and now the Reagan administration have submitted to Congress proposed legislation to reform our immigration laws. Both the Carter legislation [S.B. 52252 and HR 9531, (1978)] and the legislation unveiled by the present administration[67] propose amnesty for persons who are already in the Country. While neither bill has become law the fact that each submission has included such a proposal indicates its likelihood of being part of any final legislation. These children, presently excluded from an education by virtue of Section 21.031 would become lawful residents and be entitled to remain under these approaches.

Thus, to the extent that this legislation proceeds upon an assumption that those deserving of a Texas education are only those who will remain, it rests on a mistaken hypothesis that further points out the irrationality of this legislation. Many of these children will remain. If they are educated, they will add to the intellectual and economic life of Texas. If they are not educated, the cost in terms of lost human potential, tax potential, and likely socially undesirable behavior will haunt not only the State of Texas but the Nation as a whole.

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[67]Office of the White House Press Secretary, Statement by the President (July 30, 1981); See also p. 9 of the typed brief of the United States in this Court.

D. Undocumented Children Are Educationally Similarly Situated To Their Classmates

Undocumented children are educationally similar to children who are afforded an education by Texas. Many of the children excluded by this legislation have been in this Country virtually their entire lives and have attended only American schools. (See e.g. JA A-7, A-16, A-23, A-28). Many of the children like the Doe children, are fluent in English and are able to progress through the educational system with little or no supplemental assistance; others, of course, are recent immigrants who may need supplemental assistance. In this regard they are no different from other immigrant children and many citizens.

Dr. Jose Cardenas, an educator who testified for the Plaintiffs, testified that the undocumented recent immigrant "requir[ed] a similar school response" to that appropriate for other recent immigrants. Indeed, Dr. Cardenas made an observation common among educators familiar with the recent upper-aged immigrant when he noted

> it has been our experience that in the education of alien children they tend to perform at levels much higher than American-born minority children. In general, they perform better than American-born and race minority children.

(JA B-40).

Jim Bob Hensley, the witness called by the State to describe the problems of the border school districts testified that "along the border where eighty percent of the population is Mexican American, . . . the educational program (for recent immigrants) is pretty much the same" (JA B-88-89).

John Eaton, the witness called by the State to describe the situation in Houston was instructive on this point. Mr. Eaton used the terms Latin-American, Hispanic, migrant and illegal alien interchangeably when "describing" the educational characteristics of undocumented children (JA B-69-72). Mr. Eaton also agreed that recent immigrant chil-

dren needed bilingual instruction irrespective of their immigration status as do many children who are born in this Country (JA B-75-76).[68]

In sum, undocumented children are individuals whose educational needs cannot be described by reference to their immigration status. Any effort to do so, and especially any effort to exclude them from school because of the artificial attribution of certain characteristics is irrational.[69]

IV

THE DISCOURAGEMENT OF UNLAWFUL IMMIGRATION IS NOT A PERMISSIBLE PURPOSE FOR THE STATE TO ASSERT IN DEFENSE OF SECTION 21.031

As an afterthought,[70] the State now asserts that Section 21.031 is an effort to stem unlawful immigration. The facts belie the assertion. More importantly, however, such a purpose cannot stand as an independent basis for sustaining this legislation against an Equal Protection challenge. Only the Federal Government has the power and right to regulate the flow of persons acros a national border.

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[68]The attribution of certain educational characteristics to undocumented children found in the State's statement of facts is based generally on this testimony of Mr. Eaton concerning "migrants". See n.26, *supra*. The State's further assertion that undocumented children are "double trouble" since they may not have school in Mexico is an unfocused assertion since many of these children have been in the United States all their lives, and many, no doubt, have attended school in Mexico just as their documented immigrant classmates.

[69]The State fails to mention in its brief that it receives substantial sums from the Federal Government to aid students—all students—with special needs. In 1977, the State received 148 million dollars pursuant to Title I of the Elementary and Secondary Education Act alone. (JA B-50).

[70]See n.67, *supra*. Further indicia that this justification is of recent origin is the fact that the Texas legislature has taken no steps, as have other states, to penalize employers for the employment of undocumented persons. Without arguing the merits of such legislation it would seem to be the first step for a state purportedly concerned with halting employment-based unlawful immigration.

In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) this Court observed:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.*

142 U.S. at 659 (Emphasis added).

This power of the *Federal* Government, as an incident of its sovereignty, to regulate its borders has been repeatedly recognized. *The Chinese Exclusion Case*, 130 U.S. 581, 608 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1940); cf. *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976).

In recognition that the regulation of the borders is a matter reserved for the Federal Government, this Court has regularly struck down State laws that seek to regulate the flow of traffic across the Nation's border. For example, in *Chy Lung v. Freeman*, 92 U.S. 275 (1875) this Court held that a State statute which required disembarking passengers to post a bond violated the Constitution. The Court ruled,

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations; *the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the National Government.* If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

92 U.S. at 280 [Emphasis added]. See also *Passenger Cases*, 48 U.S. 283 (1849); *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

It is true that not every State law that has some affect on immigration is preempted. As stated in *De Canas v. Bica*, 424 U.S. 351 (1976) "If—local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . ." *Id.* at 356. One must distinguish however between State enacted legislation which has an *incidental effect* on immigration and State enacted legislation which has as its *purpose* the regulation of the flow on persons across the border.

To permit a State, as in the instant case, to advance independently as against an equal protection challenge, the objective of restricting unlawful immigration would be to permit a State to take a national problem into its own hands. It is just such a result and its potential implications for international relations that lies at the foundation of this Court's decisions upholding the exclusive authority of the Federal Government to regulate the Nation's borders.

At issue in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), was whether a State statute denying State college scholarships to those who refused to declare their intent to become citizens violated the Equal Protection Clause. One justification offered by the State was that the statute encouraged persons to become citizens. This Court summarily dismissed this justification as "not a permissible one for a state." 432 U.S. at 10. The State in the instant case requests this Court to sanction a law which much more directly regulates immigration than the statute involved in *Nyquist*. Too, it is fraught with substantially greater international implications. Should this State be permitted to justify this legislation on the grounds that it is seeking to regulate immigration little is to stop the other forty nine from the business of halting unlawful immigration. While statutes which incidentally affect the flow of the border may not be preempted, purposeful efforts to effect

that flow should not serve as a permissible independent rationale under the Equal Protection Clause.[71]

The State also argues that it is compelled to enact legislation such as 21.031 to implement federal laws which establish the terms and conditions for foreign students to attend schools in the United States. The establishment by Congress of a means to permit those resident in another country to attend schools in the United States does not provide guidance concerning whether undocumented residents of the State of Texas can be denied elementary or secondary education. Cf. *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976).[72]

A. THE IMPACT OF THE DENIAL OF SCHOOLING ON UNLAWFUL IMMIGRATION IS SPECULATIVE AND MINIMAL

This brief previously discussed the role of schooling as an attraction for unlawful immigration[73]. Suffice to say that the vast majority of persons come to this country because of the desperate financial conditions in their home country.

[71]The State argues in passing that if it does not enact legislation such as this it might be guilty of "harboring" undocumented children. 8 U.S.C. § 1324(a). This seems especially fanciful in light of the fact that this section has been in its present form, with penalties, since 1952, that none of the fifty States enacted legislation such as 21.031 until Texas in 1975, and that none of the more than 16,000 school districts in the Country has even been charged with "harboring". The most frequently cited authority defining "harboring" is *United States v. Lopez*, 521 F.2d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). It defined "harboring" as "intended to encompass conduct tending substantially to facilitate an alien remaining in the United States illegally, provided, of course, the person charged has knowledge of the alien's unlawful status." *Id.* at 441. Teaching a child reading and writing hardly fits this definition.

[72]The fact that the United States takes no position as to the constitutionality of section 21.031 pursuant to the Equal Protection Clause provides assurance that they do not view the congressional activity in this area as expressing a position on the issue at bar.

[73]See section III(C) *supra*.

They come for employment. While no doubt one can find a family for which education played a role in their decision to come to the United States, the record, reflects that their numbers are both speculative and small.

Further, viewing the situation from a national perspective, it is notable that no other state has a limitation similar to that of Texas. Thus the impact of Texas' policy, if any, is likely to result in increased immigration to other states, not any reduction in immigration *per se*. In sum, the State's own statement, and the lack of advancement of the objective of limiting unlawful immigration undercut the present assertion that this was an objective of Section 21.031. In any event such an objective is impermissible for the State of Texas.

V

SECTION 21.031 IS PREEMPTED AS IT CONFLICTS WITH AND FRUSTRATES FEDERAL EDUCATION POLICY

The primary objectives of federal education policy have been to assure that those most disadvantaged have a fighting chance to overcome their disabilities. "It presumes, as did the first U.S. Commissioner of Education, that 'Education prevents being poor' "[74] This legislation, which effectively denies any education to children with serious educational and economic disabilities, is likely, in the words of the State's witnesses, to create a "serf class"[75] This clash between the most basic goal of federal educational legislation and the Texas legislation mandates a finding that the Texas legislation has been preempted pursuant to the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

The Elementary and Secondary Education Act of 1965 (ESEA) was the first major effort by the Federal Government to address the existent educational needs of the

---

[74]124 Cong. Rec. S14065 (August 23, 1978).

[75]Testimony of Shane Davies. (JA B-69).

disadvantaged.[76] That effort was the "flagship" legislation at the inception of the Nation's War On Poverty.[77] In setting forth the purpose of the initial ESEA, the Senate Report observed:

> The President, in his education message, stated that one of the four major tasks confronting us was to "bring better education to millions of disadvantaged youth, who need it most." The reported bill was designed to carry out this task.[78]

This is still the primary task of that legislation.[79]

Title I of the Elementary and Secondary Education Act is the cornerstone of federal aid to our Nation's elementary and secondary schools.[80]

> . . . [T]he central characteristic of the program is the way in which it directs funds to districts based on their numbers of low-income children, on the theory that poverty and low scholastic achievement are closely related.[81]

The ESEA targets funds to school districts and ultimately to schools on the basis of a poverty count. Once funds are allocated to a school, all children within the school who suffer educational deficit are eligible to participate in the program. This latter policy reflects an effort by Congress to allow sufficient flexibility at the local level to deal with the design or delivery of educational services.[82]

---

[76]The ESEA has been reenacted with minor changes in approximately four-year cycles. Its last full authorization consideration was 1978. It presently is codified at 20 U.S.C. § 2701 *et seq.* See also, 95 Stat. 463 (The Education Consolidation and Improvement Act of 1981).

[77]124 Cong. Rec. S14065 (August 23, 1978).

[78]1965 U.S. Code, Cong. and Adm. News, 1450.

[79]124 Cong. Rec. S10465 (August 23, 1978).

[80]110 U.S. Code, Cong. and Admn. News, Dec. 1978, Legislative History, p. 4.

[81]*Id.*

[82]110 U.S. Code, Congress and Administration News, Dec. 1978, Legislative History, p. 4.

The goal of Title I remains today, as it did when President Johnson spoke, to "target . . . educational services to those who need them most."[83] As observed by Senator Javits, co-floor manager of the most recent reenactment of the ESEA, "The fundamental purpose of federal aid to education is to provide high quality educational opportunity to *all children* in the United States."[84] The final embodiment of that legislation continues the tradition of targeting funds on the basis of all poverty children between the ages of five and seventeen.[85]

The record reflects that undocumented alien children are among those children who are most in need. To deny them access to an education, as does the Texas legislation, clearly flies in the face of congressional efforts to alleviate the cycle of poverty through the provision of equal education opportunity to all children irrespective of their immigration status.

Title I presumes a correlation between poverty and educational need. Exhibits introduced into evidence clearly reflect the difficult economic circumstances of the named Plaintiffs.[86] Not surprisingly, the economic circumstances of the named Plaintiffs mirror the general condition of most undocumented aliens. Although most are employed, their employment tends to be in the low-paying sectors of the workforce.[87] As Dr. Marion Houstoun, co-author of the major study on illegal immigration, testified, even within those low-paying categories, undocumented aliens earned "two-thirds of the wages of U.S. workers comparably employed . . . (and) worked an average of 8.6 hours more per week than the U.S. workers."[88] If the Title I

[83]Statement by Senator Javits, ranking minority member of the Senate Subcommittee of Education, Arts and Humanities during debate on the most recent reenactment of the ESEA, 124 Cong. Rec. 14048 (August 23, 1978). See also 95 Stat. 464.

[84]124 Cong. Rec. 14048 (August 23, 1978) [Emphasis added].

[85]20 U.S.C. 2711 (a)(3)(D).

[86]See e.g. P. Ex. 2, 5 and 11, Sept. T. 58, 92, 123.

[87]See e.g. JA B-6, B-9, B-17-18.

[88]JA B-18.

presumption is correct, undocumented aliens are among those most in need.

The record in fact documents this need. While both Plaintiffs' and Defendants' witnesses agreed that in terms of need undocumented children were no different from their brothers who migrated with documents, all agreed that many had special needs.[89] Dr. Jose Cardenas, testified that virtually all new immigrants regardless of status needed bilingual education and other compensatory programs in order to obtain a fair chance at educational success.[90] Defendants' witnesses agreed.[91] In sum, the Record fully reflects that many of these children are among those who not only need an education to avoid economic disaster but indeed need the full benefit of the program that the Federal Government has developed. Dr. Davies testified that the exclusion of these children from an education would result in virtual serfdom. The Record supports him. It is just such a condition that led President Johnson to propose Title I of the Elementary and Secondary Education Act and subsequent Congresses to adopt it. The Texas legislation directly frustrates this purpose.

Other sections of the Elementary and Secondary Education Act reflect the congressional policy that children with the disabilities frequently ascribable to the Plaintiffs not be relegated to a position of serfdom. Most notable is a subcategory of Title I which allocates funds for migrant children[92] and Title VII which reflects a congressional concern for children whose primary language is other than English.[93] The children targeted for this latter program include, *inter alia*, "individuals who were not born in the United States or whose language is a language other than English."[94] The report of the Senate Committee reporting

[89]See e.g., JA B-38, B-75-76.

[90]JA B-38-39.

[91]See e.g. testimony of John Eaton, JA B-71.

[92]20 U.S.C. 2761.

[93]20 U.S.C. 3221.

[94]20 U.S.C. 3223(a)(1)(A).

on the most recent reenactment of ESEA enacted, "The Committee strongly believes that an effective bilingual education program ought to be implemented to benefit *all* children in need of such service throughout the nation."[95]

The one major expression of congressional educational policy not found in the Elementary and Secondary Education Act is the Education of the Handicapped Act, 20 U.S.C. 1412, *et seq.* That Act creates an entitlement for a "free appropriate public education for *all* handicapped children between the ages of three and eighteen . . ."[96]

Section 21.031 of the Texas Education Code causes some direct clashes with the provisions of the above-stated federal legislation as well as frustrating its general purpose. For example, it is clear under the Education of the Handicapped Act that *all* handicapped children are entitled to free appropriate education. A handicapped undocumented child is manifestly entitled to an education under these provisions, but the Texas statute denies him that right.

While none of the above-stated legislation expressly provides for undocumented children, it is clear that they are among the group that has most concerned Congress in its various educational pronouncements. It is their condition-poverty-that has triggered that legislative concern. The recent reenactment of ESEA occurred at a time of intense debate over illegal immigration to the United States and its effect on the well-being of United States citizens; yet, as previously set forth, each of the relevant Titles provided for the education of all children within the targeted group. In reenacting legislation concerning poor children, migrant children or limited English speaking children in 1978, one could hardly expect Congress to be ignorant of the impact on undocumented children. No hint of an effort to limit those programs on the basis of immigration status

[95]Quoted in a prepared statement by Senator Hathway, Cong. Rec. S14057 (August 23, 1978). [Emphasis added].

[96]20 U.S.C. 1412(2)(B). [Emphasis added]. The entitlement is triggered by receipt by the State of funds authorized under the Act. It is believed that Texas is a recipient of funds under this Act.

is found in such legislation. Silence at this juncture in history speaks loudly.

In sum, by the enactment of the Elementary and Secondary Act in 1965 and subsequent legislation, Congress altered its relationship with the States to achieve the goal of eliminating a de facto class system in the United States which sprung from poverty and led to exploitation. This altered relation is reflected in the quotation from the late Senator Robert Taft found in the Senate report accompanying the initial enactment of the Elementary and Secondary Education Act. As Senator Taft observed:

> Education is primarily a State function, but in the field of education, as in the fields of health, relief and medical care, the Federal Government has a secondary obligation to see that there is a basic floor under those essential services for all adults and children in the United States.[97]

That basic floor has been breached by the Texas legislation. Both directly and indirectly, it frustrates a major federal effort. Legislation which denies a minimal education to a class of innocent children is preempted.

While State legislation can be preempted under various theories, the instant legislation is preempted because it directly conflicts with Federal statutes and, more importantly, because it frustrates their general goals. "Even if Congress has not completely foreclosed State legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid Federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Preemption occurs when the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 57 (1940). See also *Ray, supra*, at 158; *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-541 (1977); *De Canas v. Bica*, 424 U.S. 351, 362 (1976). In order to find preemption under this latter concept, it is not necessary that it be

[97] 1965 U.S. Code, Cong. and Admin. News, 1450.

"imposible to meet both Federal and State requirements." *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1275 (5th Cir. 1978).

Likewise:

> For when the question is whether a Federal act over rides a State law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less than that which is expressed.

Savage v. Jones, 225 U.S. 501, 533 (1912).

While the cases reflect an individual assessment of whether congressional purposes have been frustrated, it is notable that preemption has been found in instances where conflict between congressional purpose and the State legislation was far less direct than in the instant case. For example, in *Graham v. Richardson*, 403 U.S. 365 (1971), this Court ruled that State welfare residency requirements for permanent resident aliens were preempted by the Immigration and Naturalization Act (INA). The Court drew this conclusion notwithstanding a provision in the Social Security Act which specifically had barred provisions such as residency requirements with respect to "citizens." It certainly could have been inferred that such requirements were permissible for non-citizens including permanent resident aliens. Instead, the Court looked to the broader congressional policy found in 42 U.S.C. § 1981 that provides that all persons within the United States shall have "full and equal benefits of all laws," 403 U.S. at 377. See also *Perez v. Campbell*, 402 U.S. 637 (1971).

The unswerving congressional purpose found in the Elementary and Secondary Education Act is directly and immediately frustrated by the exclusion of these children from access to even a rudimentary education; as such, section 21.031 violates the Supremacy Clause of the United States Constitution.

VI
CONCLUSION

Sections 21.031 (a), (b) & (c) are unconstitutional for they violate the Equal Protection Clause and interfere with the objectives of Federal education policy. The rulings of each of the lower Courts should thus be affirmed.

Respectfully submitted,

LAW OFFICE OF LARRY DAVES

VILMA S. MARTINEZ
LINDA HANTEN
PETER D. ROOS*
Mexican American Legal Defense
and Educational Fund
(MALDEF)
Attorneys for Appellees

*Counsel of Record

Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS

I

THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II

ARTICLE VI, Clause 2, UNITED STATES CONSTITUTION, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

III

TEXAS EDUCATION CODE ANN. tit. 2, § 21.031 (Vernon 1980) provides in part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of that

year in which admission is sought shall be permitted to attend public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

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NOS. 80-1538 AND 80-1934

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Appellants

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AND

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Appellees

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Appellants

VS.

J. AND R. DOE, as Guardian Ad Litem for I. Doe, ET AL.
Appellees

Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit

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APPELLANTS' REPLY BRIEF

JOHN C. HARDY
200 Peoples National Bank Building South
Tyler, Texas 75702

Attorney for Tyler I.S.D.

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

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APPELLANTS' REPLY BRIEF

In the various briefs filed by Appellees and *amici* on their behalf, numerous arguments are advanced in support of the decisions of the lower courts. Most of the pertinent arguments presented have been dealt with in the Brief for Appellants and those filed by *amici*, including the United States. However, certain characterizations of the record and arguments not accepted by the lower courts deserve response.

I.

Preemption

Appellees continue to press their argument that Section 21.031 is unconstitutional in violation of the Supremacy Clause.[1] Lacking any direct support for their assertion, Apellees rely principally upon congressional "silence." Appellees' Brief on the Merits, *Plyler v. Doe*, p. 51 (hereinafter "A.B.*Doe*"). It is true that Congress has not directly addressed the entitlement of illegal aliens[2] to a state-supported education. Much of Appellants' position concerning the application and manner thereof of the Equal Protection Clause is premised upon the State's understanding that, within the federal sphere, Congress, not the courts, is entrusted with the power and responsibility to determine what entitlement, if any, illegal aliens have to social benefits. However, if congressional "silence" says anything, it cannot be heard to proscribe Section 21.031.

> Indeed, Congress' failure to enact such general sanctions reinforces the inference that may be drawn from other congressional action that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.

DeCanas v. Bica, 424 U.S. 351, 360, n. 9 (1976).

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1. This issue is well addressed in the brief filed by the United States. Thus the point will not be belabored here.

2. Texas uses the term "illegal aliens" because it describes the class of aliens which are not afforded a right to a state-supported education.

DeCanas is, of course, the touchstone of this inquiry. The analysis must begin with the observation that education is clearly a field of legitimate state regulatory power. *E.g., Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972).

Section 21.031 is not "a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a *legal* entrant may remain." (Emphasis added.) *DeCanas v. Bica, supra,* at 355. Certainly one interest promoted by Section 21.031 is the prevention of inducements for unlawful entry and residence. However, the State is not attempting to determine who may enter the country and, in effect, is supporting the federal determination in that regard. Further, assertion of this interest is limited to its direct and immediate impact upon the principal basis for Section 21.031, that being the protection of the State's resources for the education of its lawful residents.

It is wholly unrealistic to contend that Texas does not have a cognizable interest in the prevention of inducements for an indeterminate number of children to enter the State illegally and enroll in its schools. It is clear that Texas' interest in this regard is local in nature; among the states, *only* Texas has a long international border with Mexico, each side of which is relatively densely populated. And only Texas must bear the burden of providing an education to children in its public schools. While this interest is also applicable to legal immigration, it is conceded that federal power to permit such immigration prevails. But there has been no such federal permission granted to Appellees; no purpose of the federal government, expressed or implied, is adversely affected by Section 21.031. In fact, the interest of Texas in preventing inducements for illegal entry and residence, as a corollary of its interests in preserving its educational resources, is fully in accord with

federal objectives. Texas has not attempted to intrude into areas of exclusively federal concern; Section 21.031 is not "a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *DeCanas v. Bica, supra,* at 356.

Nor is there any "clear and manifest purpose of Congress," 424 U.S. at 351, to preclude statutes such as Section 21.031. *Cf., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 130 (1978). The Immigration and Naturalization Act contains no language which even implies that Congress sought to prevent states from removing inducements for violation of its terms, and it is not easily ascertainable why Congress would desire to do so.

The final question is whether Section 21.031 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas v. Bica, supra,* at 363. Appellees assert that it does so with respect to federal education and immigration law.

In addition to those matters presented by the United States, it should be noted that Congress has considered the Elementary and Secondary Education Act since the enactment of Section 21.031 (A.B.*Doe,* p. 47, n. 76) and has failed to assert any objective concerning the education of illegal aliens. *c.f.,* 8 U.S.C. §1101(15)(5); Brief of Appellants, p. 19. Further, there is no purpose or objective to restrict to children actually in school the migrant count upon which *some* federal funds flow to the states. 20 U.S.C. §2762(b); J.A. C-79. While Texas may count illegal migrant children, Appellees' Brief, *In Re: Alien Children Education Litigation,* p. 53 (hereinafter "A.B. *In Re*"), Texas also loses millions of dollars by virtue of the counting of migrants in other states who usually reside in Texas. J.A. C-65. Moreover, it is highly dubious that Congress had as a purpose the education of illegal aliens when it enacted educational programs

which must supplement, not supplant basic educational programs, and which are funded at levels which permit services to less than 2/3 of eligible, lawfully resident students. *See*, Brief for Appellants, pp. 7, 10. *Cf.*, 20 U.S.C. §241(c); 45 C.F.R. §233.50. Finally, as noted by the United States (p. 20, n. 16), were Appellees correct, the remedy they seek is unauthorized.

The goal of Section 21.031 is to limit state-supported education to legal residents. At the time of trial the State's efforts to secure from the Immigration and Naturalization Service a complete list of federal documents authorizing entry and residence was still ongoing. Prior to the injunction in No. 80-1934, the State was in the process of issuing regulations on the subject in order to bring the "policy into compliance with whatever pieces of paper the INS would legally accept." Tr. No. 80-1934, March 6, 1980, p. 1289 (testimony of Commissioner Bowen). At the outset:

> The school districts were given all the information I had from INS. They were instructed repeatedly that this might not be an all-inclusive list; that there might be other legal documents that we had not enumerated in our letter; that if there were any question, they were to contact INS and find out what the status was and, if a child was legally in the country, then he was to be admitted.

Id. at 1304. The actual practice of the districts was consistent with this position or more liberal. J.A. D-27, D-89. Texas has absolutely no intention of excluding lawful residents from its schools. Section 21.031 does not interfere with the purposes of the INA.

II.

Equal Protection

A. *Level of Scrutiny*

If this Court determines that the Equal Protection Clause is applicable to illegal aliens in the context of social services[3], it does not compel strict scrutiny of Section 21.031. Elevated review has been urged on the basis that the children involved are without fault, and thus the classification is similar to illegitimacy. There have also been suggestions that race is involved and that the treatment of illegal aliens in general is relevant. *See, e.g.*, A.B.*In Re*, p. 6, n. 8. Appellants categorically reject any claim that Section 21.031 draws a classification based on race. Such a suggestion ignores the fact that all children must provide a birth certificate or similar documentation upon enrolling in school and that illegal aliens may be of any race. *See*, J.A. B-17. Further, to the extent that most illegal aliens in Texas are from Mexico, it should be borne in mind that it is the education of lawful resident Mexican-American children which is most protected by Section 21.031. *See generally*, J.A. D-1-31.

Illegal treatment of illegal aliens by their employers, although highly reprehensible, is not pertinent to the classification at issue. This treatment would not be affected by the denomination of illegal aliens as a suspect class; any exploitation at issue is already illegal. Texas is pleased to point out that the record indicates that illegal aliens, at least in the Texas metropolitan areas, do not appear to suffer from exploitation. J.A. B-19, D-104, E-39.

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3. *But see*, Brief of Appellants, p. 14 *et seq.*; *Note*, 31 Stanford Law Review 1069, 1080-84 (1979).

Nor do cases involving illegitimacy lead to a conclusion of heightened scrutiny here. Aside from the point that illegitimacy is not a suspect classification, the authorities compelling elevated scrutiny are based upon the lack of any rational reason to assume that restrictions based upon illegitimacy had any effect whatsoever upon the conduct sought to be deterred. *See, Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968). In contrast, in the case at bar, it is the children themselves who are impacting the State's educational system. There is no less onerous means to prevent that impact and the enhancement thereof due to further unlawful immigration than those utilized in Section 21.031. The parents in *Levy et al.* could not undo what was done in order to gain benefits for their children. Here, the children may remain in their native country or return thereto with or without their parents, and section 21.031 directly promotes such conduct. At most, the statute should be reviewed under the rational basis test.

B. *The State's Interest*

The primary and overall purpose of and interest underlying Section 21.031 is the protection of the State's resources from the indeterminable impact of educating the population of Mexico and other countries of origin. A subsidiary interest is in preventing the inducement of uncontrolled familial migration which magnifies that impact. The former and penumbra interest has been held sufficient to withstand strict scrutiny. *Arrendondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981), *cert. pndg. sub. nom., Martinez v. Brockette*, No. 81-857. Specifically, the interests held compelling were:

> A state has a legitimate interest in protecting and preserving the quality of its educational

> system and the right of its own *bona fide* residents to attend school on a preferred tuition basis. *Vlandis v. Kline*, 412 U.S. 441, 452-453... (1973). Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, i.e., the individual school districts.

Id. at 428.[4]

The issue in *Arrendondo* is the constitutionality of the requirement of Section 21.031(d) of the Texas Education Code that persons under 18 wishing to establish a residence apart from their parents or guardians must show that their presence in a school district is "not for the primary purpose of attending the public free schools."[5] In spite of variable mental gymnastics of Appellees concerning school finance, Section 21.031 promotes each of the interests which together were found compelling in *Arrendondo*.

Initially, the characteristics of the children at issue are such that they will by and large require special services and expensive educational programs which

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4. The support for Section 21.031 found in *Vlandis v. Kline* and its progeny is addressed in the *amicus* brief of Harlingen C.I.S.D., *et al.*, pp. 4-7. The State concurs with the arguments set forth therein.

5. It has been suggested that this provision obviates the State's difficulties concerning migration for purposes of education. A.B.*Doe*, p. 29, However, the provision, or any similar provision readily imaginable, does not address the problem of children moving from Mexico to live with an already present parent, the problem of families moving across the border for education, nor the problem of Mexican children being made the wards of resident relatives. *See also*, J.A. D-31-32.

already are in short supply. Appellees have attacked the State's description of these characteristics as applying to legal immigrants and myopically ignoring the extended duration of the presence of a number of illegal alien children. Nevertheless, the characteristics set forth (Brief of Appellants, pp. 8-10) are applicable in general to recent illegal immigrant children and a number of those who may have been present some period of time. Clearly Appellees desire to move the focus of the Court from the general characteristics of the class at issue to the carefully selected few who were named plaintiffs. Nevertheless, *no* witness testified that, as a group, these children will not have special needs. Appellees' attack is totally inconsistent with their position that characteristics *can* be assessed (A.B. *Doe*, p. 2, n. 8) and that these children will need special compensatory programs (A.B. *Doe*, p. 2, n. 4, pp. 48-49).[6] It can not realistically be doubted that, as a group, illegal aliens will cause an adverse impact upon the education of disadvantaged lawful residents.[7] Under our understanding of the English language, to agree that

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6. Appellees, in No. 80-1934, have offered no description of the class other than suggestions that "thousands" of the children formerly went to Texas schools and that the "vast majority . . . will eventually gain legal status." A.B. *In Re*, p. 18. Neither claim is accompanied by reference to the record, and neither is supported thereby. The latter is directly refuted. J.A. A-48 (majority have no chance to upgrade status - immigration counselor called by plaintiffs in *Doe*). With 20,000 as the immigration quota for Mexico (J.A. A-35) and 44,000 the yearly total quota and nonquota immigration from Mexico (J.A. A-37), it is indeed unlikely that a substantial number will become legal residents under the current law. *See*, Brief of United States, p. 13, n. 8.

7. It is suggested that the State could make do; for example, utilize alternative staffing patterns for bilingual education. A.B. *In Re* p. 15. These may be fine in the ideal; they are second-rate in practice. J.A. D-52-53, D-70. They reduce the attention students receive from a qualified bilingual teacher.

educability and need for bilingual education is not a "function" of immigration status (A.B. *In Re* p. 38) is to concede that it is not caused thereby; it is not to be so blind as to ignore that there are characteristics generally shared by illegal alien children.

Second, due in part to their special needs, illegal alien children will adversely affect the "financial integrity" of school districts where a significant number reside. While a district with few could conceivably lose more state money than it saves in reduced costs, it is silly to suggest that several thousand illegal alien children will not adversely affect Brownsville, which would have to build schools at local expense to house them (J.A. D-9-10), or Dallas, with a basic program financed by 58% local funds (J.A. D-32), or Houston,[8] which has a similar local share. While Dallas and Houston have declining enrollments, inflation and higher per pupil expenditures due in part to the special needs of urban children have not reduced their fiscal burden. J.A. D-42, D-91. Tyler I.S.D. may indeed lose some money through Section 21.031 although Appellees' witness agreed that he did not consider the cost of special programs in his analysis. J.A. B-37. Very simply, the statute would not remain on the books if it did not aid local districts. As the impact of the lower courts' orders grow with the numbers, the target school districts will be more and more seriously affected.

There is no question but that Section 21.031 preserves the State's resources. The argument in the *amicus* brief filed by Texas Impact (p. 36) based upon a fiscal note accompanying the consideration of the repeal of Section

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8. It is noted that Houston did not reduce the number of bilingual teachers after enactment of Section 21.031. A.B. *Doe* p. 35. Quite true. Houston still does not have enough bilingual teachers to serve its lawful residents.

21.031 is misconceived. There was no fiscal impact because the children were already in school pursuant to the lower courts' orders. Incidentally, the median of the *total* state contribution per child is approximately $1,500 per year. Tr. No. 80-1934, March 6, 1980, p. 1332. The $800 figure proffered by Appellees is the basic allotment without equalization aid and compensatory education funds. Specifically, the *average* state contribution for the last biennium was $1684 per year.

The State's interest in protecting its resources as well as those of its districts includes the interest in preventing inducements for unlawful immigration which taxes those resources. Trial counsel in *Plyler v. Doe* apparently believed she was on the horns of a dilemma between preemption and equal protection. However, if the views of trial counsel are material, she recognized that education was an inducement to illegal entry. Tr. No. 80-1538, December hearing, p. 343. Further, Appellees failed to note that trial counsel in No. 80-1934 requested a finding of fact that: "The provision of a free education in Texas would serve as an inducement for an increased flow in illegal immigration." R. No. 80-1934, V.I. at 178, n. 3 (*see*, A.B. *In Re* p. 35). The trial court's findings of noninducement are based entirely upon opinions and studies pertaining to adults; the findings are not logical, correct, nor supported by the record with respect to children of school age. *See*, J.A. A-52; Brief of Appellants, pp. 10-11. How many children may enter illegally for this purpose is undeterminable. J.A. D-13. In the absence of Section 21.031, only time would tell whether it would be several hundred per year or tens of thousands.[9] Unfortunately, the effects of the experiment

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9. The only reasonably reliable numbers presented in the study conducted by IDRA, Amicus Brief of Texas Impact, App. B, were collected only one month after the district court's order was issued. The State does not believe that subsequent counts set forth therein are accurate. Our information indicates a more rapid increase in some areas.

could not be reversed. If the flow increased geometrically, and there is some reason to believe it would (*see*, Amicus Brief of Federation for American Immigration Reform, pp. 4-6), Texas would be powerless to alter the demographic and educational results. There is no legal or practical reason to conclude unrealistically that Texas does not have a legitimate subsidiary interest in this regard.

Appellees have dwelled upon the sociological impact of the denial of an education to illegal alien children. A.B. *In Re* pp. 19, 43; A.B. *Doe, passim.* These arguments go to the wisdom of the statute. The Legislature and Congress are equally capable of weighing the balance between sociological costs and benefits.

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

Finally, although the State has not sought to justify Section 21.031 on the basis of relative tax contributions, Appellees have deemed it pertinent to their arguments. Actually, the contribution-consumption ratio for illegal aliens as a class or long-term resident illegal aliens in specific as compared to the average lawful resident or lawful residents similar in economic status is a complex question involving a number of parameters concerning which no solid data is available. The evidence relied upon by Appellees is based upon personal interviews and therefore suspect. There is reason to believe that the picture is not as rosy as that portrayed by Appellees. J.A. B-16, B-57-58, D-12, D-25, D-49. *See*, Amicus Brief of Federation for American Immigration Reform, p. 7, n. 26.

III.

Due Process

Appellees, in No. 80-1934, assert that Section 21.031 offends substantive requirements of the Due Process Clause. However, the substantive scope of the clause is generally limited to the "private realm of family life." *Griswold v. Connecticut, supra,* at 499; *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 499 (1978). In any event, Appellees cannot carry the burden of showing "no rational connection" between the operation of Section 21.031 and the legitimate interests of the State. *Harrah I.S.D. v. Martin,* 440 U.S. 194, 198 (1979); *Nebbia v. New York,* 291 U.S. 502, 537 (1933).

Further, it is claimed that Section 21.031 denies procedural due process citing *Goss v. Lopez,* 419 U.S. 565 (1975). First, the students in *Goss,* unlike Appellees herein, "plainly had legitimate claims of entitlement to a public education." *Id.* at 573. Nevertheless, Texas law provides for a hearing for Appellees to challenge the actions of the respective school districts. TEX.EDUC. CODE §11.13. Moreover, there is no evidence in the record that hearings are not available at the local level.[10] The record does not remotely support Appellees' contention. Nor does the contention support the order of the lower courts.

Conclusion

This is a difficult case, both politically and legally. The State's suggestion that the result herein could affect a variety of services provided by the State and

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10. Mr. Besterio's testimony did not state that no hearing was provided upon request. J.A. D-27.

cause their provision to illegal aliens regardless of federal law is based upon its view that the interests underlying Section 21.031 may not be surpassed with respect to *any* social service provided by the State. It is difficult to perceive what interest, other than ones analogous to those presented herein, would support restrictions upon the availability of other social services. It would be fully consistent with the appropriate role of the judiciary for this Court to defer to the legislative and administrative branches. The judgments of the lower courts should be reversed.

Respectfully submitted,

JOHN C. HARDY
200 Peoples National Bank
Building South
Tyler, Texas 75702

Attorney for Tyler I.S.D.

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

RICHARD ARNETT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

Office - Supreme Court, U.S.
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Nos. 80-1538 and 80-1934

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants

v.

J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees

IN RE: ALIEN CHILDREN EDUCATION LITIGATION,
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
Appellants

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee

and

CERTAIN NAMED and UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees

Consolidated Appeals from the United States Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

WASSERMAN, ORLOW, GINSBERG & RUBIN
By: James J. Orlow
Lawrence H. Rudnick
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

Motion for Leave to File Brief and Brief *Amicus Curiae* of American Immigration Lawyers Association

The American Immigration Lawyers Association respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief amicus curiae. In support of this motion, the Association states:

1. The American Immigration Lawyers Association is a national association of lawyers practicing immigration, nationality and naturalization law. The organization is supported by dues paid by its members and is dedicated to the legal advocacy of reforms in immigration, nationality and citizenship law. In addition, the Association is dedicated to preserving the statutory and constitutional rights of immigrant and non-immigrant aliens.

2. The issues involved in this case, whether "undocumented aliens" are entitled to equal protection of the laws and whether the state of Texas has established a rational system to bar "illegal aliens" from a free public education, will have a far reaching impact on many of the clients served by members of the Association. An examination of the impact of the immigration laws of the United States is essential to a just resolution of this case. As amicus curiae, the Association seeks to bring before this Court its understanding of the import of the immigration laws of the United States for its decision.

3. The effect of the immigration laws of the United States is relevant to this Court's determination. The specific interests of the Association in the immigration laws is not specifically advanced by either of the parties and may not be adequately addressed by them. Because the Association has specific expertise in the subject of immigration law, it is respectfully submitted that it can serve a useful role as amicus curiae in this case.

For these reasons, the American Immigration Lawyers Association respectfully requests that its Motion for Leave to File the annexed brief amicus curiae be granted.

Respectfully submitted,
By: WASSERMAN, OLOW, GINSBERG & RUBIN

James J. Orlow, Esquire
Lawrence H. Rudnic, Esquire
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Date:
October 27, 1981

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BRIEF *AMICUS CURIAE* OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS CURIAE*

The American Immigration Lawyers Association is a non-profit association of lawyers practicing immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. In addition, the Association is dedicated to the principles of fair treatment of aliens whether they be immigrant or non-immigrants.

As amicus curiae, the Association seeks to bring before this Court the import of the immigration laws of the United States in deciding this case. Because this interest in the present case will have a significant impact upon aliens and because the impact of the immigration laws of the United States is not specifically advanced by either party, they may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

The equal protection clause of the Fourteenth Amendment applies to all persons physically present within the State of Texas. The application of the equal protection clause does not require the State of Texas to provide all social welfare benefits including a free public education to all aliens. Decisions of this Court interpreting federal immigration law do not support the state's argument that the equal protection clause does not apply to "illegal aliens".

§21.031 of the Texas Education Code as written is not rationally related to a legitimate state objective. The State of Texas is not required to provide a free public education to all aliens. However, the statute as written does not further a legitimate state objective. The state may not seek to deter illegal immigration in a manner inconsistent with federal immigration laws. The State of Texas has not sufficiently defined the class of aliens to

be deprived of a free public education in relation to federal immigration laws and practice.

ARGUMENT

I

The Equal Protection Clause of the Fourteenth Amendment Applies to All Persons Physically Present Within the State of Texas

The equal protection clause of the Fourteenth Amendment is applicable to all persons physically present within the State of Texas. The equal protection clause is not a source of substantive rights and, therefore, its application to the state does not require, by itself, the conferral of social welfare benefits. The application of the equal protection clause does require that differences between classes of individuals rationally relate to legitimate state objectives. Amicus does not argue that the State of Texas must provide social welfare benefits including a free public education to all aliens present within the State of Texas regardless of immigration status. Amicus does argue that the equal protection clause does apply and that the manner in which the State of Texas has sought to exclude classes of aliens does not sufficiently define the class of aliens who may legitimately be excluded from a free public education.

The State of Texas argues that unlike the due process clause of the Fourteenth Amendment the equal protection clause does not apply to "illegal aliens". An examination of the wording of Section 1 of the Fourteenth Amendment of the United States Constitution provides no support for the State's argument. A state is not to deny, ". . . .to any person within its jurisdiction the equal protection of the laws." The State of Texas seeks to add judicial gloss to the words "person within its jurisdiction" that would require the person to be legally present.

Nothing in the language of the Constitution supports this interpretation.

In support of its argument, the state relies on the decisions of this Court and of other federal courts interpreting federal immigration law. See Brief of Appellants at pp. 14-17. In doing so, the state misunderstands federal immigration law and misinterprets the cases decided thereunder.

The state places principle reliance upon *Leng May Ma v. Barber*, 357 U.S. 185 (1958). In this case the Court determined, wholly as a matter of statutory construction, that an alien paroled into the United States pursuant to §212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. §1182, was not "within the United States" for the purpose of availing himself of §243(h) which allows for witholding of deportation in certain cases. The state's reliance upon this case to support its argument that persons not legally within the United States are not within the jurisdiction of the State of Texas is without foundation.

The Court's decision in *Leng May v. Barber*, supra, recognized the fundamental statutory difference between *exclusion* proceedings and deportation proceedings. Exclusion proceedings were then and are now governed by Chapter 4 of the Immigration and Nationality Act and deportation is governed by Chapter 5 of the Act. See *Leng May Ma v. Barber*, supra, at 187; §§231-240 and §§241-250 of the Immigration and Nationality Act.

Exclusion proceedings may arise when an application is made to enter the United States by an alien. The alien is to be inspected upon arrival and may be refused admission or a determination as to the alien's admissibility may be deferred. See §232 and §212(d)(5)(A) of the Act, and 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, §3.16(d) (1981). An alien paroled into the United States pursuant to these provisions is not "admitted" within the meaning of the Immigration Act. These provisions merely allow the Immigration and Nat-

uralization Service to defer a determination as to admissibility. Thereafter, the alien is treated as though no entry has been made into the United States. See 1A C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, §3.17(c). This is an entirely statutory construct for the purpose of allowing for a later considered determination of the alien's admissibility. These concerns have no relevance whatsoever to the State of Texas which will make no determination as to the admissibility of aliens.

It is important to note that the distinction between exclusion proceedings and deportation proceedings is not one that relates to the legality or illegality of the alien's presence. An alien who obtains entry into the United States by fraud, whose presense therefore is not legal, is removed from the United States by deportation proceedings. See §241(a)(1) and §212(a)(19) of the Act. Further, an alien who enters the United States without inspection, presumably a number of the undocumented school children, is likewise in deportation proceedings, §241(a)(2). See Gordon and Rosenfield, supra, at §3.16(b).

An alien who enters the United States illegally, i.e., without inspection, has made an "entry" and therefore is within the United States just as a person who was inspected and admitted, but unlike a person who was paroled. Thus, the distinction recognized in *Leng May Ma v. Barber*, supra, was merely a recognition that certain aliens physically present in the United States would be treated as not within the United States for purposes of removing them from this country. The distinction was not between those legally present within the United States who were entitled to certain relief and those here illegally who did not have such legal rights.

Likewise, *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert denied. 424 U.S. 910 (1976) relied upon by the State of Texas, Brief of Appellants at p. 15, is inapposite. The holding of this case is that Consular decisions to grant or refuse visas are not

reviewable by the Federal Courts. The Court did state, in *dicta*, that if *Burrafato* had been legally in the United States he might be able to force the Department of State to follow its own regulations but that his fundamental claim for review of the Consular proceedings did not turn upon the legality of his presence in the United States.

The District Court below in *In Re: Alien Children Education Litigation*, 501 F.Supp. 544, 568-69 (S.D. Tex 1980) correctly analyzed this issue in holding that physical presence within the state equated with being within its jurisdiction. In *Shaughnessy v. U.S. ex rel Mezei*, 345 U.S. 206 (1953), this Court focused on physical presence of the alien to determine the application of the due process clause. See also *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) where Judge Friendly noted that the equal protection clause would apply to all aliens present in the United States even if they were illegally present, citing *Shaughnessy v. U.S. ex rel Mezei*, supra. The appellants advance no convincing reason to distinguish the equal protection clause from the due process clause here at issue. Accordingly, the equal protection clause applies to all persons physically present in accord with this Court's due process analysis.

The language of §243(h) of the Immigration and Nationality Act has since been changed by Congress and an alien in exclusion proceedings may now request withholding of deportation pursuant to this provision. See The Refugge Act of 1980 (Pub. L. 96-212, Mar. 17, 1980, 94 State 109), §212(e) which amends §243(h) of the Act, 8 U.S.C. §1253; 8 C.F.R. §208.3(b) and §208.9. This change in the law serves to emphasize the solely statutory construction that was the basis of the Court's decision in *Leng May Ma v. Barber*, supra.

The State of Texas also argues that if the equal protection clause is applied to the state, it will be required to provide benefits to aliens that the federal government does not provide. The state argues this is so because the

equal protection clause, unlike the due process clause, creates rights to government benefits. Brief of Appellants at pp. 14 and 17-22.

The state's argument misconceives the nature of the equal protection clause and confuses the state's role, vis-a-vis aliens, and that of the federal government. Initially, the equal protection clause creates no rights, *In Re: Alien Children Education Litigation*, supra, at 555-556, citing *San Antonio Independent School District v. Rodriques*, 411 U.S. 1, 59 (1973) (Stewart J. Concurring). The equal protection clause is a provision for even handed treatment only if a right exists and does not require the provision of benefits. The District Court in *In Re: Alien Children Education Litigation*, supra, at 565, recognized that states may treat aliens differently from lawful permanent residents and citizens for reasons relevant to valid governmental objectives that did not impinge upon any fundamental right.

Not only does the equal protection clause not require the provision of governmental benefits, it does not impose a barrier against disparate treatment. Moreover, the equal protection component of the due process clause of the Fifth Amendment has been interpreted to apply to the federal government's treatment of aliens, and has not required the provision of all governmental benefits to aliens. See *Matthews v. Diaz*, 426 U.S. 67, 77-80 (1976).

The State of Texas fundamentally misconceives the role of the state in immigration matters. Immigration is pre-eminently a federal concern and the federal government is granted great discretion in the manner in which it treats even lawful aliens, *Matthews v. Diaz*, supra at 81. It is Congress' determination on matters of immigration law that are given great deference by the courts. See *Certain Named and Unnamed Non-citizen Children and Their Parents v. State of Texas*, ___U.S. ___, 101 S.Ct. 12, 65 L.Ed. 2d 1151, 1155 (1980) wherein Justice

Powell vacated the stay granted by the United States Court of Appeals for Fifth Circuit. Even the power of the federal government, to determine the rights of aliens, is not without limits, *Hampton v. Mom Sun Wong*, 426 U.S. 88 (1976). Certainly, the federal government has the power to regulate the rights of aliens where the state could not. Compare *Matthews v. Diaz*, supra, with *Graham v. Richardson*, 403 U.S. 365 (1971).

The state correctly notes that the federal government has placed substantial limits on the receipt of governmental benefits by even lawful aliens. Brief of Appellant at p. 18. However, the legitimate interests of the State of Texas are not to be equated with the plenary powers of the political branches of the federal government to regulate the conduct of aliens.

In summary, the State of Texas advances no compelling reasons why the plain language of the equal protection clause should not be applied and the limitations imposed by this provision be applied to the State of Texas with regard to every alien physically present in the State of Texas. Secondly, the state advances no compelling policy reasons not to apply the equal protection clause to the aliens seeking admission to the public schools of the State of Texas.

II

Section 21.031 of the Texas Education Code as Written is not Rationally Related to a Legitimate State Objective.

Amicus does not argue that the State of Texas could not, consistent with federal immigration laws, refuse to provide a free public education to a class of aliens. Amicus does argue that a statute creating such a classification must be narrowly and carefully drawn so as to ra-

tionally relate to legitimate state objectives. Since federal immigration law, regulations and practice will determine the length of an alien's stay in the United States and not state law, any such statute must create classifications that relate directly to federal immigration status. The fundamental failure of the Texas statute is to rationally relate its means of classification to its legitimate objective.

While the equal protection component of the due process clause is subject to the same analysis under the Fifth Amendment as the equal protection clause under the Fourteenth Amendment, *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), the State of Texas may not forbid the receipt by aliens of benefits that the federal government could forbid. The equal protection tests under the respective provisions are essentially the same, is the difference in treatment justified by a rational relationship to a legitimate governmental objective. *Schweiker v. Wilson*, ____U.S ____, 67 L.Ed. 186, 195 (1981). What is a legitimate governmental objective for Congress or the Executive Branch in the immigration area often will not be a legitimate concern of the state. See *De Canas v. Bica*, 424 U.S. 351 (1976).

The state advances two objectives for its exclusion of illegal or undocumented aliens from its public schools. The first is the protection of its resources and second, is to prevent incentives for illegal immigration of school age children. This latter objective is not a proper one for the State of Texas. See *Alien Children Education Litigation*, supra, at 578. Even if a legitimate consideration, the statute only deters illegal immigration in a very marginal way, *Doe v. Plyler*, 628 F.2d 448, 460-461 (5th Cir. 1980).

It is clear from the Brief submitted by the State of Texas that its concern with deterring illegal immigration in light of the alleged failure of the federal government to regulate immigration is its primary concern. Brief of

Appellants at pp. 5-13. Unlike the state's power over employment at issue in *De Canas v. Bica*, supra, a state objective to regulate the entry of aliens is not permissible. The regulation of the entry of aliens is preeminently and exlusively a federal concern, *De Canas v. Bica*, supra, at 354.

The failure of the federal government to enforce existing immigration laws or to provide immigration laws that satisfy the State of Texas, does not allow the appellants to impose their own system of immigration laws. The state's reference to Art. IV, §4 of the United States Constitution appears to make an argument that where the federal government fails to prevent illegal immigration, its obligations under this provision of the Constitution is breached and therefore the state can step in. This analysis is plainly erroneous.

The state's remedy is with the Congress and Executive branches of the United States. Stricter immigration laws and more adequate funding for the enforcement of existing laws is a concern to be addressed solely to the Congress of the United States and the Executive Branch.

Amicus does not argue that the state is pre-empted from taking any action that effects aliens. Such an argument would be plainly foreclosed by *De Canas v. Bica*, supra. Amicus does argue that the state may not rely upon as a legitimate state objective, the deterence of illegal immigration. The means to deter such immigration are wholly the concern of the federal government.

This Court's decision in *De Canas v. Bica* held that the State of California was not per se excluded from regulating the conduct of illegal aliens once present in the state. Congress' exclusive power is over the determination whether to admit an alien and over the circumstances under which he may remain, *De Canas*, supra, at 355. The California statute was in harmony on its face with federal law limiting the ability of aliens to be em-

ployed while in the United States. The state objectives were to protect the jobs of its citizens and prevent an adverse impact on their working conditions, which concerns are clearly legitimate state interests. Unlike the second justification offered by the State of Texas, there was not any assertion of a right to deter illegal immigration. To allow the state to assert such a deterence to illegal immigration would be to open the door to every form of deprivation that a state could conceive of to deter immigration. In summary, the failure of the federal government to prevent illegal immigration does not allow the state to step in and attempt its own form of regulation.

The first consideration advanced by the state, that of preserving its resources for its citizens and lawful permanent residents is plainly a legitimate state interest. If this interest can be advanced by identifying the class to be deprived of a free public education in a manner consistent with federal regulation of immigration, §21.031, would be constitutional. However, the State of Texas has not constructed such a statutory scheme.

Texas Education Code §21.031 provides for a free public education for citizens or legally admitted aliens within the prescribed age group. A "legally admitted alien" is not defined. The state equates the statutory provision with the terms "illegal aliens" or "undocumented aliens", *Alien children Education Litigation*, supra, at 554-555.

The Immigration and Nationality Act and the regulations of the Immigration and Naturalization Service extensively address the question of whether non-immigrant aliens in certain classifications are permitted to work and extensively regulate the circumstances under which permission may be given. See §101(a)(15) of the Act, and Vol. 46, No. 86 Federal Register 25 080 (May 5, 1981), 8 C.F.R. §109.1 *et seq*. The Act and Regulations do not extensively regulate who may attend public

school. The Act does provide for a temporary student visa, §101(a)(15), for those entering the United States to attend school. There is not a clearly defined federal position as to which aliens may attend public school.

There is nothing inconsistent with federal policy by the state adopting a policy of not encouraging illegal immigration. However, the state's class definition must relate to those persons the immigration laws and the Immigration Service determine to be aliens who will not remain in the United States. Where the federal authorities determined that an alien may be permitted to remain, the state may not deny such an individual a free public education consistent with the federal decision to allow the alien to remain. The state may not impose additional conditions upon an alien who is allowed to remain in the United States beyond those imposed by the immigration laws. See *Elkins v. Moreno*, 435 U.S. 647 (1978)

The statute at issue in *De Canas v. Bica*, supra, at 353 n. 2, was assumed for purposes of that decision to equate "illegal aliens" with those aliens not permitted to work under federal immigration laws and regulations, whether this was true as applied was left open on remand.

In this case, there is no attempt to harmonize the state prohibition with federal immigration law. A comparison of the state's vague definition of who is excluded from a public education contrasts sharply with the regulation of the Department of Agriculture prohibiting certain classes of aliens from receiving food stamps. 7 C.F.R. §273.4 and §273.2(f). These regulations are tied closely to the existing immigration status as determined by the Immigration and Naturalization Service and do not seek to make an independent determination as to the legality or illegality of the alien's presence. The verification provision looks to documentation provided by INS.

The complexity of the immigration laws does not make a determination of illegality one that the state can

readily make, nor does the term "undocumented alien" aid this determination. There are many and varied means for an alien who is in the United States without a legal status to become legal. §245 of the Act, 8 U.S.C. §1255, provides for adjustment of status of a non-immigrant to that of a person admitted for permanent residence. Adjustment is provided for where an alien has an immigrant visa available to him. Immigrant visas are available based on familial relationships, §201(a), §203(a)(1-2) and (4-5) and on the basis of employment, §203(a)(3)(6). Immigrant visas are also available pursuant to §208 for refugees and §249 for aliens entering prior to June 30, 1948. In addition, deportation may statutorily be withheld pursuant to §243(h) and suspended pursuant to §244.

There are varied means that may be available to "illegal aliens" to change their status. Some of the above may well be available to the parents or the school children themselves.

Even where an alien is clearly deportable, he may still remain in the United States with the permission of INS. Deportation is by no means automatic and is within the discretion of the Attorney General which discretion has been delegated to the Immigration Service. See Gordon and Rosenfield, supra, at §7.2(a) (1981). See also *Johns v. Department of Justice*, 653 F.2d 884, 890-891 (5th Cir. 1981).

The Department of Justice has, by regulation, provided for extensive means to stay deportation indefinitely. See 8 C.F.R. §242.5 and §243.4. 8 C.F.R. §242.5 provides for voluntary departure prior to commencement of a hearing. This provision authorizes district directors of INS to allow voluntary departure under a variety of circumstances pursuant to the discretion granted in §242(b) of the Act. Among the classes authorized for voluntary departure is that in §242.5(a)(2)(i) for natives of a foreign contiguous territory or §242(a)(2)(vii) where

the district director determines there are compelling factors warranting grant of voluntary departure.

8 C.F.R. §243.4 grants discretion to the district director to stay deportation after the grant of a final order of deportation. Further, the Immigration Service has an extensive Operations Instruction (O.I.) 103.1(a)(1)(ii) (1978), which provides for "deferred action" for deportable aliens. The complete text of the Operations Instruction is set forth in an appendix to this brief. Deferral is to be granted on grounds of humanitarian factors and the district director for INS should consider, *inter alia;* tender age; years in U.S. and family situation. See also Gordon and Rosenfield, supra at §5.7(e)(7).

This review of immigration law is to demonstrate that there is not a clear cut status of "illegality" or that of being "undocumented" under the Immigration Act and Regulations, nor is the effect of a lack of immigration status clear. Great discretion has been granted to the Attorney General who, in turn, has delegated this discretion to the Immigration and Naturalization Service. Therefore, an alien who is patently without a lawful status under the Immigration Act may be allowed to remain indefinitely within the United States.

Amicus does not argue that the State of Texas may not classify among aliens present within its borders. Amicus does argue that a classification based upon such vague terms as "illegal aliens" or "undocumented aliens" is not rationally drawn in conformity with federal immigration laws. The State of Texas can classify between aliens only by direct reference to the immigration status of the alien as determined by the INS. The State of Texas is not free to make its own determination as to the legality of the aliens presence. This determination has been granted exclusively to the discretion of the Attorney General.

The inherent danger in the Texas statute is that the state is making an independent determination as to who will remain in the United States. The state, in utilizing

terminology that has no relevance to federal immigration law, is sweeping broadly into what is pre-eminantly a federal area. In doing so, the state creates a classification that is not rationally related to the legitimate state objectives of preserving its resources. The state is simply not distinguishing between those persons who may be permitted by INS to remain and those who would be deported.

The question of the application of the California statute was left open in *De Canas v. Bica*, supra. In this case, the statutory scheme of the State of Texas is not in harmony with the regulatory scheme for determining which aliens will be allowed to remain in the United States.

The state also argues that because illegal aliens will not participate fully in the conduct of our goernmental affairs there is an insufficient nexus to the exercise of other rights, such as voting or holding governmental office, to require them to educate illegal aliens. First, it is not at all certain that an illegal alien today will not be a lawful permanent resident tomorrow and three or five years later a citizen of the United States. Secondly, even though an alien may not participate fully in our governmental affairs, the denial of a public education strikes at their very ability to exist in our society. See *Nyguist v. Mauclet*, 432 U.S. 1, 12 (1977). If there was a substantial assurance that these individuals who do not presently have a status recognized by federal immigration laws would only reside temporarily in the United States or would remain without a status permanently then this argument would have merit. However, this is plainly not so. The District Court found that the majority of the undocumented alien school children were here to stay. *Alien Children Education Litigation*, supra at 558. The means to adjust to a legal status as well as the very possible deferability of deportation counsels against any assumption that undocumented aliens will not have a legitimate role to play in our society.

It is amicus' position that the State of Texas may not attempt to regulate the immigration of aliens into the state by depriving their children of a free public education. Further, the State of Texas has not constructed a statutory or regulatory scheme that even attempts to harmonize its determination of illegality with the Immigration and Nationality Act and the regulations and procedures of INS. Lastly, even children without a present status recognized by federal immigration laws may well be with us to stay, and the deprivation that they suffer by the State of Texas' refusal to educate them will have a substantial impact on our society.

CONCLUSION

The equal protection clause of the Fourteenth Amendment applies to all aliens physically present in the State of Texas. The States' classification of illegal or undocumented aliens does not serve rationally legitimate state objectives.

Accordingly, amicus prays this Honorable Court to affirm the decisions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WASSERMAN, ORLOW, GINSBERG & RUBIN

By: James J. Orlow
Lawrence H. Rudnick
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Date:
October 27, 1981

APPENDIX

OPERATIONS INSTRUCTIONS 103.1(a)(1)(ii)

(ii) *Deferred action.* In every case where the district director determines that adverse action would be unconscionable or result in undue hardship because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category. His recommendation shall be made to the regional commissioner concerned on Form G-312, which shall be signed personally by the district director and the basis for his recommendation shall be set forth therein specifically. Interim or biennial reviews should be conducted to determine whether approved cases be continued or removed from deferred action category. *(Revised)*

When determining whether a case should be recommended for deferred action category, consideration should include but not be limited to the following: (1) advanced or tender age; (2) number of years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States — effect of expulsion; (5) criminal, immoral or subversive activities or affiliations — recent conduct. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate. *(Revised)*

Former military deserters at large who participated in the Discharge Review Program during the period April 5, 1977 to October 31, 1977, should be placed in deferred action category if at the time of last entry they were exempt from immigration inspection under the provisions of section 284 of the Act. The procedure outlined in the foregoing paragraphs should be followed. *(Added)*

Each regional commissioner shall maintain statis-

tics on deferred action cases on a current basis, maintained so that data can be readily extracted upon request. The statistics should be maintained in the following categories; (1) number of cases in deferred action category at the beginning of the fiscal year; (2) number of recommendations received fiscal year to date; (3) number of recommendations approved; (4) number of recommendations denied; (5) number of cases removed from deferred action category; (6) number of deferred action cases pending at the end of the fiscal year.

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Nos. 80-1538 and 80-1934

IN THE

Supreme Court of the United States

October Term, 1980

JAMES PLYLER, ET AL.,
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v.

J. AND R. DOE, GUARDIAN AD LITEM FOR I. DOES, ET AL.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeals from the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE

SAMUEL RABINOVE
Attorney for Amicus Curiae
American Jewish Committee
165 East 56th Street
New York, New York 10022
(212) 751-4000

MAUREEN SCHILD
Of Counsel

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BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE

This brief is submitted with the consent of the parties.

Interest of the *Amicus*

The American Jewish Committee is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed, or national origin, including specifically the right to educational opportunities for all individuals.

Statement of the Case

This appeal is a consolidation of suits originally brought on behalf of school-age undocumented children challenging a statute enacted by the Texas state legislature, Section 21.031 of the Education Code. The statute provides in part:

> "(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the available School Fund of that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent . . . resides at the time he applies for admission."

The impact of the legislation is to deny reimbursement to local school districts for the education of undocumented children. The school districts are permitted to charge children tuition or exclude them from school.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question of whether the exclusion of undocumented children from the schools of the State of Texas pursuant to Section 21.031 of the Texas Education Code denies these children the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

Exclusion of undocumented alien children from the schools of Texas pursuant to Section 21.031 of the Texas Education Code denies those children equal protection of the laws.

POINT I

The Texas statute does not serve a federal interest which would override the denial of basic constitutional rights.

Persons residing within the United States illegally can, for certain purposes, be treated differently from citizens and legal aliens, both by the federal and state governments.

As appellants assert, federal regulations currently prohibit states from providing undocumented aliens with cer-

tain federal benefits, including food stamps, Aid to Families with Dependent Children, and also restrict aliens' entitlement to Medicare and Medicaid. However, federal education legislation does not exclude undocumented children from coverage. Both the Elementary and Secondary Act of 1965 and the Education of the Handicapped Act provide for coverage of all children residing within the United States.

The broad Congressional power over immigration has been used to explain the disparity in treatment between aliens, even those residing in the United States legally, and citizens:

> "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not imply that such disparate treatment is 'invidious.' "

Matthews v. *Diaz*, 426 U.S. 67, 79-80 (1976).

Because this broad power is in part of a political nature, courts have not required that distinction between citizens and aliens in federal legislation be precisely tailored to the exercise of the power to regulate immigration and naturalization. For example, in *Matthews* v. *Diaz, supra,* this Court upheld the denial of Medicare eligibility to aliens legally residing in the United States for less than five years. The Court reasoned that the Medicare statute was consistent with federal immigration policy, and so did not strictly scrutinize the legislation.

Nevertheless, despite the broad federal power over immigration, courts have not always deferred to legislative judgment on these matters. For it is clear that aliens, even illegal aliens, do have certain basic constitutional rights and the standing to assert them. *Bolanos* v. *Kiley*, 509 F. 2d 1023 (2d Cir. 1975); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971); *Holly* v. *Lavine*, 529 F.2d 1294 (2d Cir. 1975).

The extent of deferral to legislative judgments depends on the interest involved and whether a federal or a state law is challenged. Denials of basic constitutional rights to aliens have been struck down by the courts, but denials of entitlements to government programs have generally been upheld. Also, courts have been more reluctant to defer to the judgment of state legislatures than to the United States Congress. For example, in *Matthews* v. *Diaz*, *supra*, the federal Medicare eligibility residence requirement was upheld while in *Graham* v. *Richardson*, 403 U.S. 365 (1972), this Court struck down a similar state residency requirement.

Amicus argues that because of the nature of the right involved—education—and because the statute challenged serves no federal objective, this Court should not defer to the Texas legislature's judgment.

On this point we believe that the case at bar can be distinguished from *DeCanas* v. *Bica*, 424 U.S. 351 (1976), in which this Court ruled constitutional a California statute prohibiting the knowing employment of illegal aliens when such knowing employment would disadvantage employment of lawful residents. As the District Court persuasively

argued in *Doe* v. *Plyler*, 458 F. Supp. 569 (1978), in *DeCanas* the California law prohibiting the employment of illegal aliens was consistent with the federal scheme enacted in the Immigration and Nationality Act of 1952, which contains a labor certification program designed to protect the United States labor market from the influx of both skilled and unskilled foreign labor. But *amicus* argues, as did the District Court, that "By contrast the Texas statute at issue in the instant case is neither intended to nor does in fact, implement any express or apparent federal objective. The state does not attempt to justify section 21.031 as an effort to exclude aliens whom Congress has chosen to exclude, nor could such justification be taken seriously." 458 F. Supp. at 585.

POINT II

The Texas statute, unlike the school financing scheme challenged in *San Antonio ISD* v. *Rodriguez*, totally deprives children of educational opportunities.

The question presented by *San Antonio ISD* v. *Rodriguez*, 411 U.S. 1 (1973) was whether the Texas dual system of financing public education, which in part based the funds available to a local school district on the property tax base of the district, violated the Equal Protection Clause of the 14th Amendment. But, while *Rodriguez* bears a superficial resemblance to the case at bar, we urge that its holding be confined to the peculiar set of facts presented by that case.

Rodriguez is often cited for the proposition that education is not a "fundamental right" to which this Court has

afforded strict judicial scrutiny. But, *Rodriguez* was primarily concerned with "threshold" questions. Therefore strict scrutiny, whether applicable in cases involving deprivation of education or not, was simply never triggered in the case:

> "This approach [of the lower courts] largely ignores the hard threshold questions, including whether it makes a difference for the purpose of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than the absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and justifications for the classifications they create are subject to strict scrutiny, we think the threshold questions must be analyzed more closely than they were in the court below." 411 U.S. at 18.

This Court deferred to the Texas legislature's wisdom on school financing, and refused to hold that the Texas dual system of school financing violated the Equal Protection Clause because: (1) the claim was speculative, for the disparity in per capita funds available to school districts having low property tax bases compared to those with higher tax bases would not necessarily affect the quality of education received. (2) Even if it could be proven that the quality of education directly correlated with per capita education expenditures "the Equal Protection Clause does not require absolute equality or precisely equal advantages," that is, any deprivation of rights involved was not absolute, but merely relative. In addition, the charge that the class allegedly discriminated against was the "poor" was not demonstrated since all poor children did not reside

in school districts with low property tax bases, or all wealthier children in districts with higher tax bases (411 U.S. at 22).

Amicus respectfully argues that the case at bar is much more clearcut than *Rodriguez,* is more amenable to judicial resolution, and also presents a far more compelling need for intervention by this Court. Here the inability of the parents of undocumented children to pay $1,000 effectively precludes the children from receiving a public education.

Indeed, in *Rodriguez* Justice Powell explicitly reserved for decision a situation like that presented by this case:

> "If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today." 411 U.S. at 25, footnote 60.

Several of the difficulties this Court was faced with in *Rodriguez* are not present in this case: The class affected by the legislation is discrete, not amorphous—undocumented school-age children residing within the State of Texas. Second, there is no doubt that an equal protection analysis is triggered because the parents of these children are completely unable to pay for a public education, and as a result, the children are absolutely denied educational opportunities by the state. For this reason this case is more analogous to prior cases in which this Court has struck down state laws

conditioning the exercise of constitutional rights on the ability to pay for the desired benefit, such as *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (invalidating state laws requiring a fee for obtaining a transcript on appeal), and *Douglas* v. *California*, 372 U.S. 353 (1963) (establishing indigents' right to court-appointed counsel on direct appeal), than to *Rodriguez*. Third, the fear that resolution of the case in favor of appellees would occasion in Texas and elsewhere an unprecedented "upheaval in public education" is not present. 411 U.S. at 56.

POINT III

Because of the nature of the right involved, in conjunction with the nature of the class affected by the legislation, the Court should strictly scrutinize this legislation.

A. Effective total exclusion from education is a denial of a fundamental interest.

As Judge Seals said in the *In re Alien Children Education Litigation*, 501 F. Supp. 544 (1980), "This case concerns what has evolved into the most important institution in this country: the public school. Our public schools no longer exist merely to supply the tools which provide access to the economic bounty and participatory process of this nation. With the decline of influence possessed by other institutions in our society such as the family and the church, the schools are being called on to perform additional functions. Public school teachers are being required to perpetuate our culture and to provide a moral compass for our children." 501 F. Supp. at 549.

While this Court has never held education to be a fundadamental interest, neither has it ruled on a state's total deprivation of educational opportunities to school-age children within its borders. Indeed, in *Rodriguez* this Court said "nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel that 'the grave significance of education both to the individual and to our society cannot be doubted.' "

Because of the vital importance of public education to the American Republic, *amicus* urges this Court to address the question left open by *Rodriguez* and to hold that an absolute denial of educational opportunities by a state to children living within its borders denies them of a fundamental interest.

But, in the alternative, even if the Court is reluctant to apply strict scrutiny to the Texas law, a total denial of educational opportunities would require an application of an intermediate standard of scrutiny such as that used in classifications by gender, which "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 198 (1976).

B. The statute, in punishing the children for their parents' violations of the immigration laws, affects the least culpable and most vulnerable group.

Amicus urges that the classification set up by the Texas law in effect punishes the children for a status over which they have no control, and that the reasons for applying a strict standard of judicial scrutiny to classifications such

as race and illegitimacy, namely that judicial protection is necessary because the class is saddled with disabilities and is in a condition of political powerlessness is present in this case. *San Antonio ISD* v. *Rodriguez*, 411 U.S. 1, 28.

This Court has established, in the cases involving illegitimate children, that the imposition of legal disabilities on a child for an act of his parents is contrary to the basic tenet of our legal system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Matthews* v. *Lucas*, 427 U.S. 495, 505 (1976). The Texas statutes denies children access to a free education solely on the basis of their immigration status which is totally outside their control. In cases involving the rights of illegitimate children this Court has observed that parents have the ability to conform their conduct but that children can affect neither their parents' status nor their own status. *Trimble* v. *Gordon*, 430 U.S. 762, 770 (1977).

The inability of undocumented alien children to control their own destiny clearly distinguishes the nature of their constitutional rights from those of other persons, including their parents. As this Court remarked in *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), which held unconstitutional a Louisiana workers compensation statute that denied recovery by illegitimate children for their father's death: ". . . visiting this condemnation on the head of the infant is illogical and unjust."

The same rationale this Court used in *Weber* is applicable to the present case. While the purpose of the law in *Weber*—to save state funds and to discourage birth outside

wedlock was permissible, the means of achieving these goals, namely, denying the child death benefits, was not. Similarly, in this case, while the Texas statute's purpose of saving funds is legitimate, denying a child, through no fault of his own, a public education, is unreasonable and arbitrary. In providing for a free public education for children of elementary and secondary school age, the State of Texas has established a statutory right. The state should not be permitted to discriminate against some children on the basis of the actions of their parents.

POINT IV

The State of Texas' denial of educational opportunities has severe consequences for appellees and would create unprecedented social problems if upheld by this Court.

In *San Antonio School District* v. *Rodriguez,* this Court said, "It cannot be questioned that the constitutional judgment of the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere unprecedented upheaval in public education." 411 U.S. at 56. *Amicus* respectfully urges that a decision of this Court upholding Section 21.031 and thereby permitting other states to pass laws requiring parents of undocumented children to pay substantial sums for their children's public education would create unprecedented social problems.

While the number of illegal residents within the United States remains uncertain [Report of the Comptroller General to the Congress of the U.S., April 1981], the best estimates place the number from three to six million. While

only about 3% of illegal immigrants are estimated to have children in the schools, since most undocumented aliens tend to be young single men in search of employment, it is nevertheless evident that, were states such as New York and California with large populations of undocumented workers to pass laws similar to Section 21.031, thousands of children would be denied an education altogether, thus creating what would in effect be an illiterate "underclass" of persons living within the United States.

As Judge Seals said in the *In Re Alien Children Education Litigation*:

> ". . . it is impossible to perceive the impact of the creation of a permanent underclass of persons who will live their lives in this country without being able to participate in our society.
>
> . . . The public school has been a mechanism to assimilate immigrants into our society. Uneducated children who eventually will be admitted into this country, will never be admitted into the society." 501 F. Supp. at 562.

The American Jewish Committee is deeply concerned about the impact of legislation such as this. We believe that denying children living within the United States borders access to a free public education would introduce a bleak chapter into American history. The American Jewish Committee has, since its founding in 1906, been a strong supporter of public education. We see it as vital to preserving American pluralism, which for Jews and other minorities, is a central feature of American life. Or, as Justice Fortas said in *Tinker* v. *Des Moines Community School District*:

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues rather than through an authoritative selection." 393 U.S. at 512.

As an organization whose members are the sons and daughters of immigrants, the American Jewish Committee recognizes that, to a large extent, free public education made possible the economic and social advances of American Jews and other ethnic groups in the 20th Century. While we recognize that a serious problem has arisen because many more immigrants have been entering the country outside the legal process than enter through legal means, and other who enter lawfully as visitors overstay their visas and remain unlawfully, we urge that the public schools of this country are not the proper place to address this problem. Whether or not these children are granted access to the public schools, most of them will stay in the United States. And, sadly, they will become the first generation of American immigrants unable to read and write, probably unable to speak English, and not able to fully participate in our society.

Conclusion

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

SAMUEL RABINOVE
Attorney for Amicus Curiae
American Jewish Committee

MAUREEN SCHILD
Of Counsel

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INTEREST OF AMICUS

The Asian American Legal Defense and Education Fund (AALDEF), is a non-profit corporation established in 1974 under the laws of the States of California and New York. It was formed to protect the civil rights of Asian Americans throughout the nation through the prosecution of lawsuits and the dissemination of public information.

In the last fifteen years, there has been a dramatic increase in Asian immigration to the United States. While Asians now comprise one-third of the legal immigration to this country each year,[1/] a number of Asians are also undocumented aliens. It is AALDEF's experience that Asian undocumented aliens suffer from the most extreme forms of exploitation in all

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1. See U.S. Comm'n on Civil Rights, Civil Rights Issues of Asian and Pacific Americans: Myths and Realities 11 (1979) (hereinafter "Civil Rights Issues"), citing annual reports of the Immigration and Naturalization Service.

aspects of their daily lives, which merely compound the burdens of race and national original that continue to disadvantage Asian Americans in general.

A primary concern of amicus is discrimination against Asian Americans on the basis of their immigration status. From the Chinese Exclusion Act of 1882 to the national origins quota system, abolished in 1965, our nation's immigration and nationality laws have repeatedly singled out Asians for exclusion and discriminatory treatment. These immigration laws, which utilized invidious racial and national origin classifications, were then used in conjunction with state laws to deny Asian Americans equal access to education, employment, business opportunities and government benefits.

As a result of this historical discrimination against Asian immigrants, amicus views with great concern state laws, such as section 21.031 of the Texas Education Code, which deprive undocumented aliens of educational

and other opportunities because of their immigration status.[2/]

SUMMARY OF ARGUMENT

State statutes have relied historically upon apparently neutral immigration classifications and documentation requirements to subject aliens to invidious discrimination. Federal immigration and nationality laws laid the groundwork for a comprehensive scheme of state statutes that successfully restricted the rights of Asian immigrants to work, travel and own property for several decades. Although racially exclusionary immigration laws are now obsolete, their ostensibly neutral character continues to provide a convenient device to discriminate against aliens residing in this country.

Section 21.031 of the Texas Education Code bears an ominous resemblance to previous

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2. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

state laws which subjected Asian immigrants to invidious discrimination. Although section 21.031 appears to apply equally to all undocumented aliens who enter the country illegally, the deprivation of tuition-free education in fact falls almost exclusively upon Mexican children. The discriminatory intent behind section 21.031 can also be inferred by the long history of discrimination against Hispanics in Texas. Since the statutory classification of undocumented aliens will inevitably burden racial and ethnic minorities, it should be subject to heightened judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I. STATES HAVE HISTORICALLY USED FEDERAL IMMIGRATION CLASSIFICATIONS AND DOCUMENTATION REQUIREMENTS AS TOOLS OF INVIDIOUS DISCRIMINATION AGAINST ASIANS IN AMERICA.

Throughout history, restrictive state statutes have been used in concert with

immigration laws and alien documentation requirements to discriminate against racial and ethnic minorities. Although section 21.031, which denies tuition-free education to Mexican undocumented alien children, is one recent example, the precursors of such laws were enacted almost a century ago in a series of facially neutral state statutes that targeted Asians for invidious discrimination because of their immigration status.

The first group of Asians to immigrate in substantial numbers to the United States were the Chinese, who arrived in 1847 in California as male contract laborers in mining, railroad, agriculture and other menial occupations. As the Chinese came into competition with whites in the labor market, racist and anti-alien sentiments in the depression economy of the 1870's led to the passage of federal laws to curtail further Chinese immigration and state laws to restrict substantially the rights of Chinese who remained in this country.

Early state laws which apparently limited the opportunities of all noncitizens were in fact directed at the Chinese. As early as 1850, the California Legislature enacted the Foreign Miners' License Tax,[3] which was reproduced and translated into Chinese for mass distribution and enforced almost exclusively against Chinese aliens.[4] Moreover, Article XIX, Section 4 of the California State Constitution of 1879 proclaimed that "The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of the State. . . ." The provision further explained that the term, "foreigners ineligible to become citizens," referred specifically to

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3. Act of April 13, 1850, ch. 97, § 1 et seq., 1850 Cal Stats. 221, sustained in People ex ex rel. Attorney General v. Naglee, 1 Cal. 232 (1850)(repealed 1851).

4. The California Legislature subsequently attempted to make a statutorily conclusive presumption that all Chinese were "miners." Act of May 17, 1861, ch. 401, § 93, 1861 Cal. Stats. 448, invalidated in Ex parte Ah Pong, 19 Cal. 106 (1861). See M. Coolidge, Chinese Immigration 36 (1909).

Chinese, who were to be removed beyond municipal boundaries or, alternatively, placed in official Chinese ghettos.[5] And in 1880, California passed a law prohibiting the issuance of licenses for the transaction of any business or occupation to "any alien ineligible to become an elector in the state"[6]--a class that was predominantly Chinese.[7]

Other state statutes directed against Asian immigrants were couched in overtly racial terms. In the area of education, for example, California's public education law was amended in 1860 to permit separate schools for the education of "Negroes, Mongolians and Indi-

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5. Other provisions in the 1879 State Constitution prohibited the employment of Chinese by any California corporation, Art. XIX, § 3; barred public employment of Chinese, id. § 3; and denied Chinese the right to vote and to own or inherit real property. Art. I.

6. Ch. 51, § 1, 1880 Cal. Stats.

7. See E. Sandmeyer, The Anti-Chinese Movement in California 74 (1939).

ans,"[8] but later repealed for economic reasons.[9] When efforts to exclude Chinese and Japanese children altogether from public education failed, see, e.g., Tape v. Hurley, 66 Cal. 473, 475, 6 P. 129 (1885) (Chinese); Aoki v. Deane (Japanese), specific statutory authority was created for the establishment of separate schools for Chinese and Japanese children.[10]

A major turning point occurred when Congress passed the Chinese Exclusion Act of 1882.[11] The Act initially suspended all immigration of

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8. Ch. 329, § 8, 1860 Cal. Stats.; see also ch. 159, 1863 Cal. Stats. 194. The constitutionality of the separate school law was upheld in Ward v. Flood, 48 Cal. 36 (1874).

9. General School Law of California, § 1662 at 14, 1880 Cal. Stats.; see C. Wollenberg, All Deliberate Speed, Segregation and Exclusion in California Schools, 1885-1975 24-26 (1976).

10. Ch. 117, § 1, 1885 Cal. Stats. 99 (Chinese); ch. 193, § 33, 1893 Cal. Stats. 253 (Indians); ch. 685, § 1, 1921 Cal. Stats. 1160 (Japanese). See generally C. Wollenberg, All Deliberate Speed, id. at 28-107; J. Hendrick, The Education of Non-Whites in California, 1849-1970 (1977).

11. Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58.

Chinese laborers for ten years and explicitly prohibited Chinese aliens from becoming citizens.[12] The Act was extended several times until 1904, when a permanent and total ban against all Chinese immigration was instituted.[13] Through its unprecedented use of immigration laws to create an official national policy of racial discrimination toward Chinese immigrants, Congress laid the groundwork for future state laws that would discriminate against all Asian immigrant groups.

The federal immigration classification, "aliens ineligible for citizenship,"[14] soon

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12. Id. § 14.

13. Act of July 5, 1884, ch. 220, § 4, 23 Stat. 115; Act of Oct. 1, 1888, ch. 1064, § 1, 25 Stat. 504; Act of April 27, 1904, 33 Stat. 428. This legislation was upheld in The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

14. See generally Gordon, "The Racial Barrier to American Citizenship," 93 U. Pa. L. Rev. 237 (1945). Ineligibility for citizenship later became the basis for excluding all Japanese immigration to the United States. Immigration Act of 1924, ch. 190, 43 Stat. 153; see 2 U.S. Code Cong. & Adm. News 1653 (1952).

emerged as code words for state-sanctioned racial discrimination against Asians, primarily the Japanese. A series of alien land laws passed in the 1920's predicated ownership of land upon eligibility for citizenship. The Supreme Court in Ozawa v. United States, 260 U.S. 178, 195 (1922), sanctioned the application of such laws against "the brown and yellow races of Asia," and state courts routinely upheld their validity as applied to Asians.[15/]

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15. See, e.g., California Delta Farms, Inc. v. Chinese American Farms, Inc., 207 Cal. 298, 308, 278 P. 227, 230 (1929); State v. Hirabayashi, 233 P. 948, 949 (S. Ct. Wash. 1925), aff'd, 246 P. 577 (1926), aff'd, 277 U.S. 572 (1928); see also Terrace v. Thompson, 263 U.S. 197, 216-21 (1923); Porterfield v. Webb, 263 U.S. 225, 233 (1923); Webb v. O'Brien, 263 U.S. 313, 324 (1923); Frick v. Webb, 263 U.S. 326, 334 (1923); Cockrill v. California, 268 U.S. 258, 263 (1925). See generally McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Cal. L. Rev. 7 (1947); Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 Cal. L. Rev. 61 (1947).

In addition, the facially neutral requirement of "ineligibility for citizenship" was used to exclude Japanese from incorporating businesses,[16] owning or possessing firearms,[17] securing public employment,[18] and obtaining pawnbroker licenses[19] and commercial fishing licenses.[20]

Alien documentation requirements also developed initially as a device for racial discrimination against Asians. Section 4 of the Chinese Exclusion Act of 1882 was apparently the earliest documentation requirement for aliens residing in the United States. It required that all Chinese laborers planning to

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16. See Yamashita v. Hinkle, 260 U.S. 199, 200 (1922).

17. Game Laws, ch. 339, § 2, 1923 Cal. Stats. 696.

18. Ch. 417, 1915 Cal. Stats. 690.

19. See Asakura v. City of Seattle, 265 U.S. 332, 343 (1924) (provision invalidated).

20. Fish & Game Code, § 990 as amended, ch. 181, § 3, 1945 Cal. Stats. 660; see Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 426 (1948) (Murphy, J., concurring).

leave the United States establish their legal presence in this country and provided that only those laborers holding a "certificate of registration" were allowed to re-enter the United States. Although the documentation requirement was repealed in 1888, it was substituted by a more malevolent statute which prohibited all Chinese laborers from returning to this country and voided all registration certificates previously issued for this purpose.[21/]

Shortly thereafter, California sought to impose its own registration requirements to restrict further the rights of Chinese within the state.[22/] According to the statute, no Chinese were to be admitted into the state without such a certificate, and they would be subject to deportation if they could not produce such identification.[23/] This documenta-

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21. See The Chinese Exclusion Case, supra, 130 U.S. at 581, 599.

22. Ch. 140, § 13, 1891 Cal. Stats.

23. Id. § 6.

tion requirement was further used to burden the rights of Chinese to use public transportation. Section 3 of the Act required agents of all railroads, stagecoach lines and steamship lines in California to demand that Chinese produce a certificate of residence before they could purchase tickets on public carriers. The failure to produce such a certificate allowed agents to arrest the "undocumented" Chinese alien. Although this statute was subsequently declared in excess of state power, Ex Parte Ah Cue, 101 Cal. 197, 198 (1894), a California delegation later pressured Congress to adopt stricter registration requirements for Chinese.[24/]

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24. The Geary Act of 1892, ch. 60, 27 Stat. 25, required all Chinese laborers to obtain certificates of residence within one year after passage of the act, or they would be deemed unlawfully in the United States and subject to arrest. Section 6 of the Act further provided that a Chinese could be deported unless he could "establish clearly to the satisfaction of [a] judge that by reason of accident

(footnote continued on next page)

The state statutes which built upon racist immigration laws to discriminate against Asians are now an anachronism. However, their legacy stands as a continuing reminder of how immigration classifications and documentation requirements were used as devices for discriminating against racial minorities.

II. SECTION 21.031 AND OTHER STATE LEGISLATIVE CLASSIFICATIONS DIRECTED AGAINST UNDOCUMENTED ALIENS WILL INEVITABLY HAVE A DISCRIMINATORY IMPACT UPON RACIAL AND ETHNIC MINORITIES.

It is undisputed that the primary victims of section 21.031 of the Texas Education Code are children of Mexican origin, since almost

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sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act." The Supreme Court upheld the constitutionality of this statutory provision in Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893).

all undocumented aliens in Texas are Mexican.[25] Because immigration status has historically been used to discriminate against racial and ethnic minorities,[26] section 21.031 should be considered within the broader context of discrimination against Hispanics as a minority group in Texas.

Courts have noted that Hispanics are an identifiable ethnic minority entitled to protection under the Equal Protection Clause, see, e.g., Keyes v. School District No. 1, 413 U.S. 189, 197 (1973), and it is well established that Hispanics in Texas have been subject to a long history of invidious discrimination in such areas as education, employment, economics, health and politics.[27] In

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25. See Doe v. Plyler, 628 F.2d 448, 451 n.6 (1980).

26. See point I supra.

27. Graves v. Barnes, 343 F. Supp. 704, 728 (W.D. Tex. 1972), aff'd sub nom., White v. Regester, 412 U.S. 755 (1973); see also Briscoe v. Bell, 432 U.S. 404, 406 & n.2 (1977); Castaneda v. Partida, 430 U.S. 482, 487, 495 (1977); Hernandez v. Texas, 347 U.S. 475, 478 (1954).

particular, courts have recognized the state's repeated failure to provide adequate educational and bilingual services to Hispanic children in Texas schools.[28/] In view of the widespread discriminatory practices against Hispanics in Texas, particularly in the area of education, section 21.031 should be regarded as yet another example of discrimination against Mexicans based on their national origin.

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28. See, e.g., Alvorado v. El Paso Independent School District, 426 F. Supp. 575 (W.D. Tex. 1976), aff'd, 593 F.2d 577 (5th Cir. 1979); United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 863-64, 869-70 (5th Cir. 1972) (en banc); 532 F.2d 380, 391 (5th Cir. 1976); 564 F.2d 164, 174 (5th Cir. 1977), cert. denied, 99 S. Ct. 3106 (1979); Zamora v. New Braunsfels Independent School District, 519 F.2d 1084, 1084 (5th Cir. 1975) (per curiam); Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975), cert. denied, 423 U.S. 1034 (1975); Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599, 617-21 (S.D. Tex. 1970), aff'd, 467 F.2d 142 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 930 (1973).

Moreover, in light of current immigration trends, the discriminatory impact of statutory classifications directed at undocumented aliens will fall primarily upon aliens of certain distinct racial and ethnic groups--i.e., Mexicans and Asians. Largely because of previous restrictive immigration laws,[29] numerical quotas for Mexico, the Philippines, China and Hong Kong have been continuously oversubscribed,[30] while the quotas for Euro-

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29. Mexican immigration was cut by almost 50% when the 1976 amendments to the Immigration and Nationality Act imposed a per-country limitation of 20,000 upon Western Hemisphere countries. Act of October 3, 1965, Pub. L. No. 94-571, 66 Stat. 163; see U.S. Comm'n on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 15 (1980) (hereinafter "The Tarnished Golden Door").

For a general discussion about immigration restrictions upon Asians, see M. Coolidge, Chinese Immigration, supra; E. Sandmeyer, The Anti-Chinese Movement in California, supra; F. Chuman, The Bamboo People: The Law and Japanese Americans (1976); H. Lasker, Filipino Immigration (1931).

30. See The Tarnished Golden Door, id. at 17. There is an annual limit of 20,000 immigrants for each independent country, Immigration and Nationality Act § 202(a), 8 U.S.C. § 1152(a) (1980), and a limit of 600 immigrants for each dependent area, such as Hong Kong. Id. § 202(c); 8 U.S.C. § 1152(c) (1980).

pean and other countries are seldom filled. In August 1981, for example, certain family relatives of citizens and resident aliens seeking to emigrate from the Philippines faced waiting periods of three to eleven years, while the spouses and unmarried sons and daughters of Mexican resident aliens faced backlogs of thirteen years. In addition, there was a waiting period of up to twelve years for certain immigrant workers from Hong Kong and the Philippines.[31] Given the enormous backlogs and lengthy delays in the visa petitioning process for Mexican and Asian immigrants, it is not surprising that many will seek to come to the United States even temporarily and eventually become part of this country's undocumented alien population.[32]

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31. See U.S. Dep't of State, Bureau of Consular Affairs, Immigrant Numbers for August 1981, Vol. V, No. 11 (1981).

32. Although the total number of Asian undocumented aliens is unknown, at least 9,500 to 16,000 have been apprehended annually by the Immigration and Naturalization Service over

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In Yick Wo v. Hopkins, 118 U.S. 356 (1886), this Court invalidated a facially neutral California laundry ordinance which revealed none of the prejudices against Chinese aliens to whom it had been applied exclusively. The Court

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(footnote continued from previous page)

the past few years. Most Asian undocumented aliens entered the country with valid entry documents but subsequently violated the terms of their visas. See North, "Asia-Pacific Illegal Aliens: A Discussion of Their Status, Limitations, and Rights Under the Law," Civil Rights Issues, supra note 1, at 238-39.

With respect to Asian undocumented aliens, it is the experience of amicus that many live in densely-populated Asian American communities of urban areas throughout the country. Most are relegated to low-paying jobs with long working hours, often as garment factory, restaurant or health care workers. Fearful of reprisals by their bosses, Asian undocumented aliens hesitate to complain about their employers' frequent refusals to pay minimum wage or overtime compensation and are afraid to participate in worker organizing efforts to secure better working conditions. They are similarly reluctant to complain to landlords about poor housing conditions, to seek police assistance if they are victims of crime, or to obtain medical care in the event of illness. At the same time, Asian undocumented aliens pay more in taxes than they receive in social services and make substantial contributions to the well-being of Asian American communities and the general society. See generally Civil Rights Issues, id. at 181, 582.

concluded:

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.

Id. at 374.

Like the superficially neutral state ordinance at issue in Yick Wo v. Hopkins, supra, section 21.031 apparently applies to undocumented aliens of all races and nationalities. However, the classification is inevitably discriminatory against Mexican aliens, in light of the ethnic background of virtually all undocumented aliens in Texas and the long history of discrimination against Hispanics in that state. Accordingly, section 21.031 should be subject to the heightened judicial scrutiny traditionally accorded to racial and national origin classifications.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

MARGARET FUNG
STANLEY MARK
Asian American Legal Defense
and Education Fund
350 Broadway, Suite 308
New York, New York 10013
(212) 966-5932

BILL LANN LEE*
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

Attorneys for Amicus Curiae

*Attorney of Record

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1538

JAMES PLYLER, SUPERINTENDENT OF THE TYLER INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants,
vs.
J. AND R. DOE, AS GUARDIANS AD LITEM FOR I. DOE, ET AL.,
Plaintiffs-Appellees

BRIEF OF AMICUS CURIAE CALIFORNIA STATE BOARD OF EDUCATION IN SUPPORT OF APPELLEES

THOMAS M. GRIFFIN
Chief Counsel
California Department
of Education
721 Capitol Mall, Rm. 535
Sacramento, California 95814
(916) 445-4694

Attorney for Amicus Curiae
California State Board
of Education

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BRIEF OF AMICUS CURIAE CALIFORNIA STATE BOARD OF EDUCATION IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

The State Board of Education of the State of California has specific constitutional and statutory responsibilities for the administration of the public school system of California. With over 4.5 million pupils in 1,043 districts, the California system of public instruction is the largest in the country.

Like the State of Texas, California is a border state with large numbers of immigrant children. During the

1979–80 school year, approximately 930,000 children in California were of Mexican descent; approximately 288,000 had limited or no English Language proficiency [1] and an estimated 40,000 of our children were not, in the language of the Texas statute, "legally admitted aliens." [2] California has more illegal alien children attending its public schools than does Texas.

Unlike Texas, however, California does not have a statute like Section 21.031 of the Texas Education Code.[3] On the contrary, California has two statutes, Education

[1] California Education Code, Section 52161.

[2] The testimony of Marion Houstoun on pp. 76–79 of the December transcript indicates that about one-half of the undocumented Mexican aliens in the United States live in California and about one-fourth of such aliens live in Texas. The number of undocumented alien children of school age living in Texas was found to be approximately 20,000 (*In re Alien Children Education Litigation* (1980), 501 F. Supp. 544 at 577). Assuming the ratio of school-age children to total population of undocumented aliens is constant between the two states, California would have about 40,000 school age children who are undocumented aliens.

[3] Section 21.031 of the Texas Education Code, the constitutionality of which is at issue herein, provides as follows:

"(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

"(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district."

Code Sections 48200 and 48400, which require all pupils between the ages of 6 and 18 to attend school in the district in which they reside. All pupils attending school are included in the statutory formula for generating local and state funds. There is no distinction in California law between alien children and children who are citizens or between those alien children who have immigration status and those who do not.

Because the California State Board of Education oversees generally the education of children described by the Texas statute here in question, and because of the number of children involved is even greater in California than in Texas, it believes that it has a point of view which this Court may find helpful.

STATEMENT OF POSITION

There have been many constitutional and fiscal arguments advanced to the District Court, the Court of Appeals for the Fifth Circuit and to this Court by the parties and, undoubtedly, by other amici. Included within this issue is the threshold question of whether the constitutionality of the Texas statute is to be measured by the "strict scrutiny" test or by the more lenient "rational basis" test.

Counsel for the children (Appellees herein) have argued quite persuasively that this Court should employ the "strict scrutiny" standard, both because the statute, in its wording and its effect, classifies pupils on a suspect basis—alienage—and because education is a "fundamental interest" of the children that is being adversely

affected (as a practical matter denied) by the statute.

Amicus does not wish to undermine the thrust of this argument. On the contrary, we believe that both the District Court [4] and the Court of Appeals for the Fifth Circuit [5] correctly concluded that the "strict scrutiny" test applied and that the Texas statute failed to meet that test.

However, it is the position of the California State Board of Education that the statute must fall even if the "rational basis" test is utilized because the statute does not rationally advance any legitimate state interest.

ARGUMENT

THERE IS NO LEGITIMATE STATE INTEREST IN DEPRIVING UNDOCUMENTED ALIEN CHILDREN OF ACCESS TO A PUBLIC EDUCATION

There can be no doubt that education is among the most important services provided by our society in terms of its impact on and importance to the individual and its impact on and importance to society as a whole.

The California Supreme Court has correctly characterized the crucial role which education plays to society and its members (*Serrano* v. *Priest,* 5 Cal. 3d 584; 96 Cal. Rptr. 601; 487 P. 2d 1241 (1971). Although the following quotation from the *Serrano* decision is rather lengthy, it is set forth here because of its relevance to the instant issue:

"We, therefore, begin by examining the indispen-

[4] 458 F. Supp. 569 (1978).
[5] 628 F. 2d 448 (1980).

"sable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. '[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.' (Note, *Development in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

"The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions—while not *legally* controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning.[23]

"The classic expression of this position came in *Brown* v. *Board of Education* (1954) 347 U.S. 483 [98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R.2d 1180], which invalidated de jure segregation by race in public schools. The high court declared: 'Today, education is perhaps the most important function of state and

[23] Defendants contend that these cases are not of precedential value because they do not consider education in the context of wealth discrimination, but merely in the context of racial segregation or total exclusion from school. We recognize this distinction, but cannot agree with defendants' conclusion. Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education.

"local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' (*Id.* at p. 493 [98 L.Ed. at p. 880].)

"The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. Most recently in *San Francisco Unified School Dist.* v. *Johnson, supra,* 3 Cal.3d 937, where we considered the validity of an anti-busing statute, we observed, '[u]nequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.' (*Id.* at p. 950.) Similarly, in *Jackson* v. *Pasadena City School Dist., supra,* 59 Cal.2d 876, which raised a claim that school districts had been gerrymandered to avoid integration, this court said: 'In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.' (*Id.* at p. 880.)

"When children living in remote areas brought an action to compel local school authorities to furnish

"them bus transportation to class, we stated: 'We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the *sine qua non* of useful existence. . . . In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.' (Fn. omitted.) (*Manjares* v. *Newton* (1966) 64 Cal.2d 365, 375–376 [49 Cal.Rptr. 805, 411 P.2d 901].)

"And long before these last mentioned cases, in *Piper* v. *Big Pine School Dist., supra,* 193 Cal. 664, where an Indian girl sought to attend state public schools, we declared: '[T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied.' (*Id.* at p. 673; see also *Ward* v. *Flood* (1874) 48 Cal. 36.) Although *Manjares* and *Piper* involved actual exclusion from the public schools, surely the right to an education today means more than access to a classroom.[24] (See *Horowitz & Neitring, supra,*

[24] Cf. *Reynolds* v. *Sims* (1964) 377 U.S. 533, 562–563 [12 L.Ed.2d 506, 527–528, 84 S.Ct. 1362], where the Supreme Court asserted that the right to vote is impaired not only when a qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal electoral apportionment: 'It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been en-

"15 U.C.L.A. L.Rev. 787, 811.)

"It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two 'fundamental interests' which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. '[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few.' (Fn. omitted.) (Coons, Clune & Sugarman, *supra*, 57 Cal.L.Rev. 305, 362–363.)

"The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is

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tirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.' [Citation.]" (Fn. omitted.)

" 'preservative of other basic civil and political rights. . . . (*Reynolds* v. *Sims, supra,* 377 U.S. 533, 562 [12 L.Ed.2d 506, 527]; see *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 370 [30 L.Ed. 220, 226, 6 S.Ct. 1064].) The drafters of the California Constitution used this same rationale—indeed, almost identical language—in expressing the importance of education. Article IX, section 1 provides: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.' (See also *Piper* v. *Big Pine School Dist., supra,* 193 Cal. 664, 668.) At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

"The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed 'the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny.' (*McCollum* v. *Board of Education* (1948) 333 U.S. 203, 216, 231 [92 L.Ed. 649, 661, 669, 68 S.Ct. 461, 2 A.L.R.2d 1338] (Frankfurter, J., concurring).) In *Abington School Dist.* v. *Schempp* (1963) 374 U.S. 203 [10 L.Ed.2d 844, 83 S.Ct. 1560], it was said that 'Americans regard

" 'public schools as a most vital civic institution for the preservation of a democratic system of government.' (*Id.* at p. 230 [10 L.Ed.2d at p. 863] (Brennan, J., concurring).)[25]

"We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'[26]

"First, education is essential in maintaining what several commentators have termed 'free enterprise

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"[25] The sensitive interplay between education and the cherished First Amendment right of free speech has also received recognition by the United States Supreme Court. In *Shelton* v. *Tucker* (1960) 364 U.S. 479 [5 L.Ed.2d 231, 81 S.Ct. 247], the court declared: 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' (*Id.* at p. 487 [5 L.Ed.2d at p. 236].) Similarly, the court observed in *Keyishian* v. *Board of Regents* (1967) 385 U.S. 589 [17 L.Ed.2d 629, 87 S.Ct. 675], 'The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas. . . .' (*Id.* at p. 603 [17 L.Ed.2d at p. 640].) (See also *Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 512 [21 L.Ed.2d 731, 741, 89 S.Ct. 733]; *Epperson* v. *Arkansas* (1968) 393 U.S. 97 [21 L.Ed.2d 228, 89 S.Ct. 266].)

"[26] The uniqueness of education was recently stressed by the United States Supreme Court in *Palmer* v. *Thompson* (1971) 403 U.S. 217 [29 L.Ed.2d 438, 91 S.Ct. 1940], where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court decision which refused to permit the closing of schools to avoid desegregation, the court stated: 'Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments." *Brown* v. *Board of Education, supra,* at 493.' (*Id.* at p. 221 [29 L.Ed.2d at p. 442], fn. 6.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: 'The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities.' (*Id.* at p. 229 [29 L.Ed.2d at p. 447].)

" 'democracy'—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.[27]

"Second, education is universally relevant. 'Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education . . . .' (Fn. omitted.) (Coons, Clune & Sugarman, *supra,* 57 Cal.L.Rev. at p. 388.)

"Third, public education continues over a lengthy period of life—between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

"Fourth, education is unmatched in the extent to

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[27] In this context, we find persuasive the following passage from *Hobson* v. *Hansen, supra,* 269 F.Supp. 401, which held, inter alia, that higher per-pupil expenditures in predominantly white schools than in black schools in the District of Columbia deprived 'the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children.' (*Id.* at p. 406.)

"'If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this call is . . . the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition . . . .' (*Id.* at p. 508.) Although we realize that the instant case does not present the racial aspects present in *Hobson,* we find compelling that decision's assessment of the important social role of the public schools.

"which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, *supra,* 57 Cal.L.Rev. at p. 389.) '[T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up.' (*Hobson* v. *Hansen, supra,* 269 F. Supp. 401, 483.)

"Finally, education is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that 'a child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years.' (Coons, Clune Sugarman, *supra,* 57 Cal.L.Rev. at p. 388.)"

Although this court has not held that education is a fundamental interest under the United States Constitution,[6] the importance of education to our people has been recognized in a number of contexts. For example, the long line of decisions ordering school integration under the Fourteenth Amendment has been predicated

[6] See, e.g., *San Antonio Independent School District* v. *Rodriquez* (1973) 411 U.S. 1; 93 S.Ct. 1278; 36 L.Ed.2d 16.

upon *Brown* v. *Board of Education, supra.*

In addition, this court in *Lau* v. *Nichols,* 414 U.S. 563, held discriminatory an educational program which deprived students who did not speak English of a meaningful opportunity to participate.

The discrimination against children in this case is even more pronounced than the discrimination forbidden by this court in *Brown* and *Lau.* In those cases, the plaintiff children were receiving some semblance of an education. They were not, however, receiving an educational opportunity that was equal to that provided other children. In this matter the plaintiff children are effectively denied any kind of an education at all.

When one reads the factors that make education important, one feature is obvious: *there can be no rational distinction in the importance of education to the individual that distinguishes one individual from another.*

The State of Texas might attempt to justify its exclusion of alien children on one or more of several grounds as follows:

(1) Illegal alien children, unlike children with immigration status, are not likely to remain in the state and are, therefore, unworthy of significant support.

(2) Illegal aliens, even when they remain in the state, do not contribute to society and should, therefore, be precluded from receiving its benefits.

(3) The provision of a free education to alien children will encourage children and their parents to enter this country illegally.

The responses to the above possible grounds are fairly

obvious and are as follows:

(1) The factual bases for the assumptions have not been demonstrated, and

(2) Even if the factual bases are true, they do not constitute reasonable cause for excluding alien children from educational opportunities.

There is really no credible evidence to suggest that illegal alien children are more likely or less likely to remain in the state than anyone else. Moreover, even if it could be demonstrated as a matter of fact that children of illegal alien parents are more transient than children of parents who are legal aliens or citizens, such would not constitute grounds for excluding children from school. There are many groups of children (such as children of parents engaged in migrant agricultural work and children of parents who are members of the armed forces) who are known to have a high degree of transiency, particularly in terms of public school attendance. It has never been suggested that eligibility for school attendance should be based upon a lack of transiency.

Similarly, it has not been demonstrated as a factual matter than illegal aliens contribute more per person or less per person than other people who are citizens or legal aliens. On the contrary, it should be obvious that any person who resides and works in a community will contribute as much to that society in terms of taxes as any other person earning the same family income. Illegal aliens pay the same amount of sales tax on a purchase as anyone else. If they own property, they pay property

taxes to the same extent as anyone else on property of a similar value. If they rent property, the landlord will pay the same degree of taxes and will pay those taxes through rents obtained from the tenant. Clearly, the amount of taxes paid by a person to the state or federal government depends upon the income of that person or his or her family and does not depend at all on the person's immigration status. Moreover, it has never been suggested that children of rich parents are entitled to a better education than their less wealthy neighbor merely because the latter child's parent contributes more in taxes. On the contrary, a hallmark of the public school system since its early beginnings has been the availability of equal educational opportunities to children without regard to their individual wealth.

There is no evidence at all to suggest that availability of a free education is a significant motivation for the illegal entry of aliens into this country or any particular state. On the contrary, it should be clear that alien children enter this country because their parents come here for reasons of economics and the availability of work rather than for educational reasons.

In the last analysis, the Texas statute is not justifiable on educational grounds; it is a desire by the state to save money. While we understand the pressure of declining fiscal resources for education, this fiscal justification for the statute must also fail, for two reasons.

First, the need to conserve resources has never been held to justify invidious discrimination against particular groups. While the educational opportunities for all stu-

dents may be reduced equally, distinctions based on race, sex and national origin are impermissible.

Second, while we admit that education is an expense to the state, there also are costs to the state for the care, confinement, and services to persons who are unable to function well in our society. There is an inverse relationship between the degree of education enjoyed by a person and his or her dependency on welfare and other social services and his or her involvement with the criminal justice system. It has never been demonstrated that education is more expensive than ignorance.

CONCLUSION

As educators concerned with the provision of quality education for all children and for the improvement of society through an educated population, the California State Board of Education believes strongly that there is no rational educational or fiscal purpose in excluding children of illegal aliens from receiving the educational opportunities available to all other children. For this reason, we believe that the decision below should be affirmed.

Dated, Sacramento, California, September 27, 1981.

Respectfully submitted,

THOMAS M. GRIFFIN
Chief Counsel
California State Department of Education,
Attorney for Amicus Curiae

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v.

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Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

Amicus Brief of Edgewood Independent School District in Support of Appellees

DONALD J. WALDHEIM, ESQ.
436 S. Main Avenue
San Antonio, Texas
Of Counsel

JOHN R. VASQUEZ, ESQ.
MARY ESTHER HERNANDEZ, ESQ.
JUAN AGUILERA, ESQ.
Mexican American Bar Association
of San Antonio, Inc.
P.O.Box 9351
San Antonio, Texas 78204
Pro Bono Attorneys

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Appellees.

On Appeal From The United States Court of Appeals For The Fifth Circuit

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Amicus Brief of Edgewood Independent School District in Support of Appellees

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The Edgewood Independent School District by and through their Pro Bono counsel, the Mexican American Bar Association of San Antonio, Inc., moves the Court for leave to participate as Amicus curiae herein for the purpose of filing the attached brief.

Respectfully submitted,

Donald J. Walheim, Esq.
Attorney for Edgewood
Independent School District
436 S. Main Avenue
San Antonio, Texas 78201

Of Counsel

John R. Vasquez, Esq.
Mary Esther Hernandez, Esq.
Juan Aguilera, Esq.

Mexican American Bar
Association of San Antonio,
Inc.
P. O. Box 9351
San Antonio, Texas 78204

Attorneys Pro Bono

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Nos. 80-1538 and 80-1934

JAMES PLYLER and STATE OF TEXAS, et al.,

Appellants,

v.

J. and R. DOE, as guardian ad litem for I. Doe, et al.,

Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION, STATE OF TEXAS AND TEXAS EDUCATION AGENCY,

Appellants,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee,

and

CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,

Appellees.

On Appeal From The United States Court of Appeals For The Fifth Circuit

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Amicus Brief of Edgewood Independent School District in Support of Appellees

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STATEMENT OF INTEREST

The Edgewood Independent School District is a political subdivision of the State of Texas located on the west side of San Antonio. Due to the poverty of the neighborhood it serves, the Edgewood ISD is among the poorest school districts in the state and nation.

The Edgewood ISD serves a fourteen (14) square mile area with approximately 80,000 residents. Property valuations average $6,400 and are among the lowest in the State.

The community served by the Edgewood ISD is made up almost entirely by Mexican Americans who, because of inadequate educational opportunities, have

achieved only minimal financial success.

For the 1981 school year, 15,827 students have been enrolled in 18 elementary schools, 6 middle schools, and 3 high schools. Coming generally from poor families headed by persons with only grade school educations, the children served by the Edgewood ISD generally have more extensive educational needs than children in other school districts. Despite these needs, low-wealth school districts, such as Edgewood, do not have access to local tax revenues that are proportional to the revenues generated by high-wealth school districts.

The Edgewood ISD employs 944 teachers most of whom are paid at or near the State's minimum salaries. Due to the low pay and lack of financial resources, the Edgewood ISD experiences some dif-

ficulty in recruiting and retaining teachers. Further, teachers, and students as well, must contend with inadequately heated and cooled buildings some of which date back to the 1930s since neither state nor federal funds may be used for capital improvements.

Given this extreme need for resources, a suit attacking the Texas system for financing public education was initiated by a group of Mexican American parents who resided in the district in 1968. In the landmark decision of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Court denied the efforts by these parents to attain equal financial resources from the state for the education of their children.

In Rodriguez, the Court was pre-

sented with extensive information of the Edgewood ISD and the State funding plan, which, although almost ten years old, is fairly representative. The primary change in State funding since Rodriguez has been the adoption by the State of a school funding equalization program which has not really eliminated the financial gulf that separates the Edgewood ISD from wealthier districts.

Given this background, the decision of this court on the constitutionality of Section 21.031, which would have its greatest impact on poor, urban and predominantly Mexican American school districts, is of extreme significance. The Edgewood ISD opposes Section 21.031 which would, it believes, adversely impact the children Amicus serves.

QUESTIONS PRESENTED

1. Whether Section 21.031 of the Texas Education Code, which denies a free public education to undocumented alien children by withholding support from local school districts for their education while at the same time providing support for free public education to citizen and resident alien children, contains an invalid classification in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the denial by the State of Texas of a free public education to all children except citizen and legal resident children is rationally related to a legitimate governmental objective?

SUMMARY OF ARGUMENT

The Equal Protection Clause provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. It is undisputed by the State of Texas that legal resident aliens are entitled to the equal protection of the laws. It is also undisputed that the Due Process Clause extends to all aliens, even if they are undocumented. Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206 (1953). Therefore, the Court in this case need only address the issue of whether undocumented aliens are entitled

to equal protection of the laws.

The Supreme Court has already indicated that undocumented aliens are covered by the Equal Protection Clause. The Fifth Circuit in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980) wrote:

> While the Supreme Court has never explicitly addressed whether the equal protection clause extends to illegal aliens, the Court in Wong Wing, supra, [163 U.S. 228(1896)] indicated that the Fourteenth Amendment does afford illegal aliens the equal protection of the laws. In Wong Wing the Court stated:
>
> > [In] the case of Yick Wo v. Hopkins, 118 U.S. 356, 369, it was said: "The Fourteenth Amendment is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' Those provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, ...

Id at 238, (emphasis added).

Doe at 455 (emphasis added by Fifth Circuit).

The above standard consists of a

very simple analysis under which entitlement to equal protection is determined by whether the person is within the territorial jurisdiction of the United States. The Fourteenth Amendment does not contain any modifier which requires legal presence in the United States; nor is there any case precedent for the proposition that undocumented aliens are not entitled to the equal protection of the law and may, therefore, be excluded from free public schools. Moreover, there is no legislative history which would indicate that entire groups of people, physically present within the United States, may constitutionally be denied the equal protection of the law. Based on the holding of Yick Wo and the absence of contrary authority, the fundamental

protections offered by the Equal Protection Clause must incompass undocumented alien children.

The Fourteenth Amendment is a pledge of conduct directed at all persons in the United States. It is not a contract, which undocumented alien children have failed to keep. It seems fair to say that if undocumented aliens are subject to the taxing power of the State, which they are, then they should not be denied the public education which is financed by those same taxes.

The only consistent solution to the problem created by the Section 21.031 is to apply the Equal Protection Clause to all persons physically present within the United States. The contention that people whose status within the United States is not documented are not "per-

sons" within the meaning of the Fourteenth Amendment invites some bizarre legal possibilities. For example, a state legislature might decide to base the range of penalties for various crimes on the documentary status of the victim. Upon a conviction, a felon might be sentenced up to 10 years if his victim were a citizen but only up to 6 months if his victim were an undocumented worker. This type of deprivation is the very kind which the Fourteenth Amendment was designed to protect against.

Finally, undocumented alien children must be afforded equal protection under the laws of the United States because they have no alternative sources of protection. These children are not sub-humans and will not disappear simply

because Section 21.031 refuses to acknowledge their needs and contributions. To deny that the children are within territorial jurisdiction of the United States places form over substance. Amicus can assure the Court that all of the 92 undocumented children in the Edgewood ISD are physically present and reside within the borders of the United States. Both the State of Texas and individual school districts must squarely face their obligation to provide an education for all children.

In sum, the Edgewood ISD has concluded that since the children of undocumented workers are persons within the jurisdiction of the United States, they must be afforded the fundamental protections of the Equal Protection Clause of the Fourteenth Amendment.

Therefore, their children cannot constitutionally be denied an education as Section 21.031 would provide.

I. THE DENIAL OF A FREE PUBLIC EDUCATION TO UNDOCUMENTED ALIEN CHILDREN ABRIDGES THE EQUAL PROTECTION OF THE LAW AND MUST BE STRICTLY SCRUTINIZED.

A. SECTION 21.031 OPERATES TO THE PECULIAR DISADVANTAGE OF A SUSPECT CLASS OF PERSONS.

The Constitutionality of the classifications used in Section 21.031 must be evaluated with the well-established two-tiered test. At the higher end of that scale, a state statute which creates a suspect classification or threatens a fundamental right must be strictly scrutinized. The contested

state statute may only be found constituional if it is found to be precisely tailored to further a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

In the instant case, Section 21.031 must be reviewed in accordance with the heightened, strict scrutiny standard because the statute singles out undocumented alien children for exclusion from free public education.

All the traditional indicia of suspectness are met in that:

> [The] class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

The facts in the instant case would seem to bear out that undocumented alien children have been relegated to such a position of political powerlessness as to command extraordinary protection (or at least ordinary protection) from the majoritarian political process. After all, the State has asserted that is has the political power to determine what rights, if any, undocumented alien children may have. Brief for the State of Texas at 17, 20, 31.

B. AS EDUCATION IS FUNDAMENTAL TO THE ENJOYMENT OF CONSTITUTIONAL RIGHTS, A LAW WHICH CAUSES CHILDREN TO BE TOTALLY DENIED A FREE PUBLIC EDUCATION MUST BE STRICTLY SCRUTINIZED.

The term education encompasses a variety of activities and events. In the home, it is a parent teaching a child love and respect, and the difference between right and wrong. In our public schools, education includes everything from teaching children reading, writing and arithmetic to instruction in the history of this nation and the protections granted to individuals by the Constitution.

These lessons in history and government are vital to the maintenance of this democracy. Our children learn that this nation is a government of laws, not men, and that the single most important document in this country is the Constitution. Children are taught that within our constitutional framework the law is not static but ever

changing. As an example of the Constitution's evolutionary process, students might learn that the right to vote, which was originally granted only to white male landowners, has gradually been extended to include nonlandowners, former slaves, women and 18 year olds. It is this type of instruction which Section 21.031 of the Texas Education Code would end.

Clearly, the State of Texas understands the significance of education in our democratic process as demonstrated by two provisions of the Texas Education Code. Section 21.032 of the Texas Education Code requires every child in the state between the ages of seven and seventeen years of age to attend public schools. Another provision requires all public free schools to offer instruction

in U. S. history and civil government. Tex. Educ. Code Ann. §21.101. The obvious intent of these laws was that all children be given the opportunity to learn their rights under the Constitution. Under the provisions of Section 21.031, though, this opportunity is denied to undocumented alien children.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), Mexican American parents whose children attended school in Edgewood Independent School District challenged the constitutionality of a state school financing plan which was felt to discriminate against children who resided impoverished districts.

Although the instant case has many similarities to the Rodriguez case, there are some important differences.

Whereas Rodriguez centered on a school funding system which caused unequal education, the instant case deals with a state law which will cause a total denial of education. Justice Potter Stewart, who delivered the majority opinion in Rodriguez, wrote:

> "Whatever merit appelles' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for an interference with fundamental rights where only relative differences in spending levels are involved. . . ."

Rodriguez at 37.

Justice Stewart went on to write that because the procedure used by the State to fund public schools did not result in a total denial of education to poor children, a fundamental interest

was not involved. Rodriguez at 37. Thus, the Court's holding in Rodriguez was based on unequal education not total denial.

In the instant case, the Court must determine whether there is some quantum of education which is protected as fundamental. It cannot be disputed that these children will be denied an education by Section 21.031. The undocumented worker-parents of these children who reside in the Edgewood ISD are generally very poor. Few, if any, have any monetary savings to speak of. If the parents of these children were required to pay tuition, almost universally their children would be unable to attend school. This absence from school would not be the outcome preferred by the parents, rather, it would be an outcome

necessitated by economics. The law would force parents of undocumented alien children to choose between paying the rent and paying tuition. This is, in reality, no choice at all.

Amicus believes that this denial of education will have adverse, long term effects. The experience of the Edgewood ISD is that many of these undocumented alien children will eventually gain legal resident status. Assuming this trend were to continue, these educationally deprived children will grow into legal resident or citizen adults who will neither comprehend nor trust our system of government.

Undeniably, there is a minimum quantum of education that is fundamental to the enjoyment of constitutional protections.

The decision in the instant case will determine whether government can deny children the opportunity to learn the knowledge which is fundamental to understanding those rights we hold so essential.

Laws such as Section 21.031, which totally deny educational opportunity to a total class of children, must be strictly scrutinized and struck down unless the State can prove a compelling interest.

II. THE EXCLUSION OF UNDOCUMENTED ALIEN CHILDREN FROM A FREE PUBLIC EDUCATION BY THE ENACTMENT OF SECTION 21.031 IS NOT RATIONALLY RELATED TO THE FURTHERANCE OF ANY LEGITIMATE GOVERNMENTAL INTEREST.

Under the Equal Protection Clause, Section 21.031 must, at minimum, be

rationally related to the achievement of a legitimate state interest. Under this standard, the State of Texas, must articulate some justification for Section 21.031. The two primary justifications relied upon by the State, each of which will be addressed separately herein, are 1) that the State of Texas and school districts will be financially benefited by the exclusion of undocumented alien children; and 2) that the quality of education offered in Texas schools will be improved by the exclusion of undocumented alien children.

A. NEITHER THE STATE OF TEXAS NOR THE EDGEWOOD ISD WILL BE BENEFITED ECONOMICALLY OR FINANCIALLY BY THE EXCLUSION OF UNDOCUMENTED ALIEN CHILDREN.

A primary justification made by the State for Section 21.031 is that both the State and school districts will be economically benefited by the exclusion of undocumented alien children from school. Amicus respectfully submits that this would not be the case.

In truth, by withholding educational funds for undocumented alien children, the State embraces a "solution" which will cost much more than the total savings anticipated. There are a number of direct and indirect costs that will be attributed to the enactment of Section 21.031.

Section 21.031 will obviously have severe long term affects as undocumented workers and their children undergo a process of metamorphosis. If historical trends hold steady, a great many, if not

majority, of undocumented immigrants will eventually obtain legal resident or citizen status. If it is assumed that the State does not enact statutes denying educational opportunity to formerly undocumented alien children (a "grandfather" law), the naturalization process will force the schools of Texas to provide an education to those it previously ignored. If the State does not publicly choose to write these children off, public schools will be faced with higher educational costs as schools attempt to remedy past neglect with enriched and specialized educational programs. Alternatively, the State might determine to follow the low road and ignore the particular needs of the formerly undocumented alien children. The State might, of couse, try to justify

this course of action by rationalizing that somebody has to do the menial work in our society.

Uneducated because of their immigration status as children, these adults would enter an increasingly more technical job market without any skills. The lucky ones will be employed in non-skilled, manual labor jobs which pay low wages. Their tax contributions to the State will be low due to their diminished earnings capacity. The unlucky will become de facto wards of the State who will never be able to work due to the State's educational practices. These unskilled and illiterate persons will never be able to partake of the fruits of our society. They will be forever doomed to an existence on the fringe of our society.

The State also contends that the exclusion of undocumented alien children will most economically benefit poor, predominantly Mexican American school districts. In point of fact, the proposed exclusionary law will likely have the opposite effects.

State funding for local school districts is based, generally, on the number of students attending schools in the district and property valuations. As the number of students declines or the value of property decreases so does State support. Under Section 21.031, State support is withheld for each undocumented alien child located. As a result, school districts, including the Edgewood ISD, are forced into either educating these children without State support or excluding undocumented alien

children by charging them tuition.

In either event, the Edgewood ISD, because of its poverty and low property valuations, would suffer a greater economic injury than benefit from the operation of Section 21.031. Like other Texas school districts, the Edgewood ISD has three primary sources of income: state and federal support and local district property taxes. Due to its low property valuation, the Edgewood ISD in 1981 relied on local tax collection for only 7% of its support.

Local tax receipts were so low, in fact, that fixed costs, which currently account for 85% of expenditures, were not covered by the property tax levy and the Edgewood ISD was forced to rely on state and federal resources to meet these unavoidable costs.

This dependence is so high that, during 1980-81, the Edgewood ISD received approximately 72% of funding from state sources and 18% of its support from the federal government. Given the priorities of the current administration, Amicus believes that state funding will become even more vital to Edgewood ISD.

Under these circumstances it is readily apparent that the withdrawal of funds under Section 21.031 will adversely affect the economic position of the Edgewood ISD.

As undocumented alien children lose state support, they might be charged tuition which few, if any, could pay. Citizen and legal resident children who remain in school will suffer adversely as the district reduces variable costs to compensate for the lost state funding.

By withdrawing funds for the education of undocumented alien children, the State harms both the undocumented alien child and his impoverished classmate.

All of the above realities plainly speak against any economic benefit being realized by the exclusion of undocumented alien children from school. In all probability the withdrawal of educational funding for undocumented alien children will likely cost both the State and the school district more money than will be saved by Section 21.031.

B. THE ENACTMENT OF SECTION 21.031 WILL NOT IMPROVE THE QUALITY OF EDUCATION OFFERED TO LEGAL RESIDENT AND CITIZEN CHILDREN

The State of Texas alleges that the enactment of Section 21.031 will improve

the quality of education by excluding undocumented alien children from school. The State contends that the quality of education is low in high poverty school districts due to the attendance of undocumented alien children. In truth, the quality of education offered by impoverished school districts is not adversely affected by the attendance of undocumented alien children. The exclusion of undocumented alien children will not improve the quality of education for a number of reasons.

First, quality of education is closely interwined with educational funding. Funding decreases have a predictably adverse affect on quality of education.

A truly just system of education would probably provide the same level of support for children no matter where

they might live. The State of Texas, through its power to allow local school districts to generate their own taxes, does not provide the same amount of educational support for each child. In reality, the quality of education in poor school districts suffers, not because of the attendance of undocumented children, but due to the poor local tax base.

Secondly, undocumented alien children share so many characteristics with resident and citizen Mexican American children that their education would not cause special problems to school districts or adversely affect the quality of education. Historically, Mexican Americans have been discriminated against and denied equal opportunity such that only a few have been able to advance up the economic ladder. The housing that many Mexican Americans can afford is no

different from the housing of undocumented workers. As they live next door, the undocumented alien child and the Mexican American child socialize and play together. At school they will likely have the same learning needs. Any differences between these children will be caused more by their individual personalities than their birthplace. Thus, the education of undocumented alien children will not cause school districts to adopt exotic educational programs that they would not otherwise use.

Third, quality of education will not be adversely affected by the small numbers of undocumented alien children residing in the state. At trial, the State had predicted that there were upward of 100,000 undocumented alien chil-

dren. A 1981 study[1], based on data submitted by each school district to the State, found only 10,884 undocumented alien children attending schools in Texas. With approximately three million school age children in Texas, the number of undocumented alien children attending schools within the State is insignificant. Amicus does not believe that the admission of undocumented alien children will adversely affect the quality education it offers students.

CONCLUSION

Section 21.031 of the Texas Education must be held unconstitutional be-

[1]Cortez, Albert, "Distribution of Undocumented Children in Texas Schools: A First Look" (Intercultural Development Research Association: 1981).

cause it is violation of the Equal Protection Clause of the Fourteenth Amendment. As enacted, the harm which Section 21.031 will cause to all children, school districts and the State of Texas far outweigh any potential benefits. The decisions of the court below should therefore be affirmed.

Respectfully submitted,

Donald J. Walheim, Esq.
Attorney for Edgewood
Independent School District
436 S. Main Avenue
San Antonio, Texas 78201

Of Counsel

John R. Vasquez, Esq.
Mary Esther Hernandez, Esq.
Juan Aguilera, Esq.

Mexican American Bar Association of San Antonio, Inc.
P. O. Box 9351
San Antonio, Texas 78204

Attorneys Pro Bono

CERTIFICATE OF SERVICE

I, Donald J. Walheim, do hereby certify that true and correct copies of the foregoing Motion and Brief of Amicus Curiae, Edgewood ISD, have been served by placing same in the United States mail, addressed to: Mr. Richard Arnett, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; Mr. Peter Roos, MALDEF, 28 Geary St., 6th Floor, San Francisco, California, 84108; Mr. James Turner, Civil Rights Division, Department of Justice, Washington, D.C. 20530; and Mr. John C. Hardy, 200 Peoples Bank Bldg. South, Tyler, Texas, 75702, on this 27th day of October, 1981.

_____

Donald J. Walheim

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CLERK

No. 80-1538 and 80-1934

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, *et al.*,
and
STATE OF TEXAS,
APPELLANTS,

v.

J. and R. DOE, as Guardian *Ad Litem* for I. Doe, *et al.*,
APPELLEES.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
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APPELLEES.

On Appeal From the United States Court of Appeals For the Fifth Circuit

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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

JOSEPH C. ZENGERLE
MARC A. REARDON
BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: 202/822-9320
Attorneys for Amicus Curiae

Blanchard Press, Inc., Boston, Mass.—Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1538 and 80-1934

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, *et al.*,
and
STATE OF TEXAS,
APPELLANTS,

v.

J. and R. DOE, as Guardian *Ad Litem* for I. Doe. *et al.*,
APPELLEES.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERVENOR-APPELLEE,
and
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
APPELLEES.

On Appeal From the United States Court of Appeals For the Fifth Circuit

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BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM, *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

Interest of Amicus Curiae

The Federation for American Immigration Reform (FAIR) is a nonprofit membership corporation founded in 1978 for the purposes of educating the general public concerning the economic, social, environmental, demographic and other effects of immigration into the United States. FAIR seeks, *inter alia*, to enhance the ability of the United States to control illegal immigration into this country. The outcome of the present cases could have a significant adverse impact on the ability of the federal government to control the flow of illegal aliens[1] into this country. Accordingly, FAIR seeks this opportunity to express to the Court its views on the issues presented by these cases.

Statement of Context

These cases come before the Court at a time when immigration to the United States is at or near the highest level in our history and increasing rapidly. A substantial portion of this flow is made up of illegal aliens, people who have circumvented American immigration laws to enter or remain in this country. The phenomenon of illegal immigration has grown to such proportions in recent years that many Americans fear our immigration policy is "out of control".[2]

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[1] Various terms have been used to describe persons present in the United States in violation of federal immigration laws, including illegal aliens, undocumented workers and illegal immigrants. We adopt here the convention recently employed by the U.S. Court of Appeals: "The term 'illegal alien' refers to a foreign national who enters or remains in the United States in violation of 8 U.S.C. §§1101-1503 (Supp. III 1979)." *Blackie's House of Beef, Inc.* v. *Castillo*, Nos. 79-1057, *et al.*, *slip op.* at 3 n.2 (D.C. Cir. Jul. 22, 1981).

[2] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION AND THE NATIONAL INTEREST 10 (March 1981) (introductory remarks by FATHER THEODORE M. HESBURGH, Chairman of the Commission) [hereinafter cited as U.S. IMMIGRATION POLICY].

Attorney General William French Smith recently testified before Congress that "our policies intended to effect the necessary control of our borders have failed.... We have lost control of our borders."[3]

FAIR offers this Statement of Context because of its belief that pressures for further migration from other countries are growing and that the decision in these cases could well encourage illegal immigration into this country at the very time current executive, legislative, and other efforts are being vigorously pursued to secure precisely the opposite objective. To explain this concern requires a brief discussion of recent data respecting immigration.

In 1980, over 800,000 legal immigrants and refugees were admitted to the United States by federal immigration authorities.[4] Legal immigration to the United States is by far the highest of any country in the world.[5] One commentator has estimated that in one recent year legal immigration to the United States was over twice that to all other countries of the world combined.[6]

The United States has recently experienced a large inflow of illegal entrants such as appellees. Because of the surreptitious or fraudulent nature of their entry into and residence in this country, reliable data on the total number of illegal aliens present in the country at any given time is not available. Estimates of the total illegal alien population of the United

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[3] U.S. DEP'T OF JUSTICE, TESTIMONY OF WILLIAM FRENCH SMITH, ATTORNEY GENERAL, BEFORE THE SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY and the HOUSE SUBCOMM. ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW (July 30, 1981).

[4] U.S. IMMIGRATION POLICY, *supra* note 2, at 93 (using Immigration and Naturalization Service data).

[5] INTERAGENCY TASKFORCE ON IMMIGRATION POLICY, STAFF REPORT 1 (March 1979) [hereinafter cited as STAFF REPORT]; NATIONAL COMMISSION FOR MANPOWER POLICY, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES 191 (Feb. 1978) [hereinafter cited as MANPOWER POLICIES].

[6] Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFFAIRS 21, 24 (1980) [hereinafter cited as Teitelbaum].

States made by federal immigration officials at various times between 1974 and 1978 varied from a high of eight million to a low of three million.[7] Most experts in the area would regard an estimate of three to six million for years in the mid-1970's to be reasonable.[8]

Evidence indicates that the annual flow of illegal aliens into this country has increased substantially in recent years. The number of apprehensions of illegal entrants by the Immigration and Naturalization Service ("INS") increased over 2000 percent in the twelve years from 1965 to 1977, rising from under 49,000 to over 1,000,000.[9] Figures on apprehensions in fact indicate more about the number of attempts to enter this country than the number of people making such attempts. Estimates as to the precise number of those who remain here each year are more uncertain. Recent studies generally agree that there has been a significant positive net flow in recent years,[10] which also means that the resident population of illegal aliens is increasing.

More important than the exact number of illegal aliens who reside here, however, is the intensification of the factors giving rise to the demand to migrate in major sending countries. The so-called "push factors" fueling increased immigration, including high fertility rates, relatively youthful populations and the inability of national economies to accomodate the large population increases, are projected to continue to increase in the coming decades.[11] The Population Reference Bureau has

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[7] Staff Report, *supra* note 5, at 383. These include, in chronological order, estimates of 6-7 million (Sept. 1974), 5 million (April 1975), 8 million (Sept. 1975), 6 million (Nov. 1976), 4 million (1977) and 3-6 million (1978). *Id.*

[8] House Select Comm. on Population, 95th Cong., 2d Sess., Legal and Illegal Immigration to the United States 16 (Comm. Print 1978) [hereinafter cited as House Report]; Teitelbaum, *supra* note 6, at 25.

[9] Staff Report, *supra* note 5, at 378.

[10] *See* Sehgal and Vialet, *Documenting the Undocumented: Data, Like Aliens, are Elusive*, 103 Monthly Labor Review 19 (October 1980)(summarizing a number of recent studies).

[11] House Report, *supra* note 8, at 24-29; Staff Report, *supra* note 5, at 17.

estimated that between mid-1981 and the year 2000, population in the less developed countries will increase by nearly a billion and one-half, compared to a projected increase of only 111 million for the more developed countries and 29 million for the United States.[12] The current combined fertility rate for the less developed countries is estimated at 4.3, compared with 2.0 for the developed countriesand 1.8 for the United States.[13] This high growth rate is mirrored in the five major source countries of immigrants to the United States.[14]

This explosive growth in the numbers of people seeking jobs, housing, and social services represents an enormous challenge to the leaders of the less developed countries. Mexico, which is among the most economically advanced of the major source countries of immigrants to the United States, is a good case in point. One commentator has estimated that in order to accomodate projected population increases over the next two decades without increasing already high rates of unemployment, the Mexican economy must generate 700,000 new jobs per year during that period.[15] Optimistic official projections of the Mexican government forecast the creation of only 350,000 new jobs per year.[16]

As these push factors intensify, so does the pressure to emigrate. But, with visa quotas for most major sending countries already oversubscribed for years into the future,[17] it can

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[12] Population Reference Bureau, Inc., 1981 World Population Data Sheet. This estimate assumes total immigration to the United States, legal and illegal, of 500,000 persons per year.

[13] *Id.*

[14] Mexico, the Philippines, South Korea, Cuba and India were the five top sending countries in 1976. House Report, *supra* note 8, at 19. *See* Population Reference Bureau, Inc., 1981 World Population Data Sheet.

[15] Teitelbaum, *supra* note 6, at 29.

[16] *Id.*

[17] *See* Staff Report, *supra* note 5, at 87-90.

be expected that this growing pressure will manifest itself in increased levels of illegal immigration into this country. The apparent growth of illegal immigration in recent years and the likelihood of its future growth have created widespread concern regarding its impact on the United States economy and society.

The effects of illegal immigration on the United States economy have received considerable attention.[18] One recent study found that the presence of illegal aliens in the labor market introduces major inequities into that market, depressing wages and preventing the improvement of working conditions for Americans in low-paying, low-status jobs.[19] This finding is significant, as disproportionate numbers of disadvantaged Americans—minorities, the handicapped, women heads of families — are in this sector of the labor market.[20] The study also concludes that continued illegal immigration could lead, for the first time in American history, to a two-class labor force and a two-class society.[21]

In addition to adversely affecting wages and working conditions, illegal aliens directly displace some citizens and legal resident aliens from jobs.[22] Moreover, while many, perhaps most,

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[18] There have been numerous studies of the effect of illegal aliens on U.S. labor markets and economies. MANPOWER POLICIES, *supra* note 5; U.S. IMMIGRATION POLICY, *supra* note 2, sec. 2; STAFF REPORT, *supra* note 5, ch. XI.

[19] MANPOWER POLICIES, *supra* note 5, at 158.

[20] This sector, referred to by some economists as the "secondary" labor market, is characterized by low wages, unattractive working conditions and minimal opportunities for advancement. It is generally concentrated in agriculture, services and light industry where levels of unionization are low. *See generally* H. WOOD and B. PHILLIPS, THE LABOR SUPPLY FOR LOW-LEVEL OCCUPATIONS (Washington, D.C. June 1975).

[21] MANPOWER POLICIES, *supra* note 5, at 159-61.

[22] *Id.* at 163. It might be noted that the Court itself agreed with most of these findings in its opinion in *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976), stating:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

illegal aliens are found in rural, low-skilled jobs, a substantial number are finding their way into better paying employment in the cities.[23] These problems have contributed to the enactment of statutes restricting employment of illegal aliens in at least eight states.[24]

Another effect of the presence of large numbers of illegal aliens is an increased demand for government services. Until recently, it has been assumed that illegal aliens use some services, particularly public education and medical benefits, but make less use of cash assistance programs.[25] Recent empirical studies have begun to cast doubt on this latter assumption.[26]

The resulting drain on state and local resources is most acute in border areas such as Texas and California. State or local governments in these and other areas have attempted to minimize through various devices the added burden illegal aliens impose on their provision of services. For example, the County of Los Angeles has sued the federal government for over $200 million for reimbursement of medical expenses incurred by illegal aliens in county facilities.[27] The State of Florida has recently sued the federal

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[23] Crewdson, *Illegal Aliens Are Bypassing Farms For Higher Pay in Cities*, N.Y. Times, Nov. 10, 1980, at 1, col. 4-5 (one of a series of articles for which author was awarded the Pulitzer Prize). In 1980, the average wage of illegal aliens apprehended in Los Angeles County over a three-month period was reported to be $5.25 per hour. *Id.* at D9, col.1-5. In Chicago, the annual average income of apprehended illegal aliens over the same period was $9,360, nearly twice the federal government's poverty level. *Id.*

[24] California, CAL. LAB. CODE §2805 (West 1980 Supp.); Connecticut, CONN. GEN. STAT. §31-51K(1977); Delaware, DEL. CODE ANN. §19-705 (1979); Florida, FLA. STAT. ANN. §448.09 (West 1981); Kansas, KAN.STAT.ANN. §21-4409 (1980 Supp.); Maine, ME.REV.STAT.ANN. ch. 26, §871 (West 1980); Massachusetts, MASS.GEN.LAWS.ANN. ch. 149, §19C; and Virginia, VA. CODE §40.1-11.1 (Michie 1981).

[25] *See* IMMIGRATION POLICY, *supra* note 2, at 38; HOUSE REPORT, *supra* note 8, at at 32-38.

[26] *See* D. NORTH, GOVERNMENT RECORDS: WHAT THEY TELL US ABOUT THE ROLE OF ILLEGAL IMMIGRANTS IN THE LABOR MARKET AND IN INCOME TRANSFER PROGRAMS vii-viii (Washington, D.C. April 1981); D. NORTH, ENFORCING THE IMMIGRATION LAW: A REVIEW OF OPTIONS 73-75 (Washington, D.C. Sept. 1980). North reports that one study estimates that over $50,000,000 was saved in calendar year 1979 as a result of a program instituted in Los Angeles County which required applicants for certain federal welfare benefits to complete INS questionnaires. *Id.*

[27] *County of Los Angeles* v. *United States*, No. CV 79-2316 (C.D. Cal., filed June 20, 1979).

government for its allegedly unlawful accomodation of illegal Haitian aliens in South Florida.[28] The laws of both New York[29] and California[30] deny welfare benefits to illegal aliens.

There are other long-range effects of illegal immigration on the future of this country, beyond those on the labor market or government services. For example, Americans might have slowed U.S. population growth by having smaller families. Yet immigration, both legal and illegal, may have doubled the rate of growth of the U.S. population in recent years.[31] It is FAIR's view that our energy, water and land resources are surely not unlimited and that controlling illegal immigration is consequently an important national imperative.

Our understanding of the available policy alternatives has fortunately been significantly advanced in the past five years through a series of studies of the issues. The Domestic Policy Council prepared a report for President Ford in late 1976.[32] President Carter established an Interagency Task Force to make a detailed analysis of the problem in 1977.[33] This series of government studies culminated in establishment of the Select Commission on Immigration and Refugee Policy. A bipartisan panel composed of representatives from Congress, the Executive and the general public, the Commission recently delivered to Congress a report containing recommendations for comprehensive reform of U.S. immigration and refugee policy.[34] In addition, President Reagan has submitted his own set of recommendations to the Congress.[35]

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[28] *Graham* v. *Smith*, No. 81-1479 (S.D. Fla., filed July 17, 1981).

[29] N.Y. Soc. Serv. L. §131-k (McKinney 1980).

[30] Cal. Unemp. Ins. Code §1264 (West 1980 Supp.).

[31] L. Bouvier, The Impact of Immigration on U.S. Population Size i (Jan. 1981).

[32] United States Domestic Council Committee On Illegal Aliens, Preliminary Report (1976).

[33] Staff Report, *supra* note 5.

[34] U.S. Immigration Policy, *supra* note 2.

[35] Office of the White House Press Secretary, Statement by the President (July 30, 1981); U.S. Dep't of Justice, Testimony of William French Smith, Attorney General, Before the Senate Subcomm. on Immigration and Refugee Policy and the House Subcomm. on Immigration, Refugees and International Law (July 30, 1981).

These cases thus come to the Court as the President and the Congress are on the brink of devising new federal policies to deal with illegal immigration. A decision that illegal aliens who establish residence in this country are constitutionally entitled to an education at public expense could handicap these efforts for two reasons.

First, it could increase illegal immigration directly. Migration results from the complex interaction of "push" and "pull" factors. If overpopulation and underdevelopment are the "push", job opportunities, high wages, and available government benefits are the "pull'. A guarantee of a free education in the United States for their children would not only be added incentive to millions of parents throughout the world but would also encourage illegal aliens who might otherwise return home after a temporary period of employment to bring their families and settle.

Second, such a decision could, at the very least, open to legal challenge state and local government efforts to prevent illegal aliens from utilizing various government programs other than education. A likely consequence of such challenges would be invalidation of such efforts on the strength of the Court's postulated decision and a resultant increase in the utilization of state and locally provided benefits by illegal aliens already here, at the very time governments at those levels are cutting back in response to taxpayer initiatives and shrinking federal assistance.

The decisions of the lower courts, if sustained, would validate for the first time the claim of illegal aliens to important public services. It would increase the pull factors which draw illegal aliens to this country and almost surely increase the incidence of their use of government services even if their numbers do not grow. At stake in this case is the power of the United States to control immigration and therefore its borders, and, in a larger sense, its future. A decision which would at once dilute this power and encourage lawless behavior is at odds with the fundamental character of our government.

Summary of Argument

The Court has been consistently meticulous in the past to extend the reach of the Equal Protection Clause only to lawfully resident aliens and not to illegal aliens. This is so because the Court has viewed the rights enjoyed by aliens to be dependent upon the strength of their ties to the United States and bare physical presence in this country as an insufficient basis on which to lay claim to equal treatment with those whose relationship with this country is substantially stronger. The extension of other constitutional guarantees to illegal aliens, particularly that of due process of law, is not persuasive authority to the contrary both because the Court has indicated that constitutional guarantees should be extended to illegal aliens an a case-by-case basis and because other rights extended to illegal aliens are not concerned with equality of treatment.

In any event, the Texas statute at issue does not deny equal protection of the laws to appellees' children. Their status as illegal aliens, however brought about, is capable of immediate voluntary or involuntary cessation and, because of its illegal nature, is not a proper subject for special judicial solicitude, thus removing them from categorization as a suspect class. Appellees' children have not been totally deprived of an education by the state's legislation, nor, because of their illegal status, would the free education they seek serve its purpose to make effective the exercise of rights to vote, to expression and to employment, and thus its availability to them is not a fundamental interest warranting strict scrutiny.

The Texas statute effectively serves important state purposes, especially given Texas' location as a border state. The state legislature could properly have chosen to protect the fiscal health, and therefore the quality, of its education system by withdrawing the right to a free public education from illegal aliens, particularly in light of the fact that the burden of their presence falls primarily on those schools which are least able to afford it. Moreover, because a failure to do so would be inconsistent with the federal decision to exclude such persons from this country and would also thereby expose the state to the risk of onerous litigation over

whether the unaltered state educational scheme was preempted under the Supremacy Clause, it could properly choose to protect its treasury from a diversion of resources necessary to defend its laws in court, by removing the statutory provision creating such vulnerability.

Argument

I. Illegal Aliens Are Not Within the Scope of the Equal Protection Clause of the Fourteenth Amendment.

Section one of the Fourteenth Amendment to the United States Constitution prohibits a state from denying the equal protection of the laws to any person within its jurisdiction.[36] As noted by the Fifth Circuit in its opinion in *Doe* v. *Plyler*, 628 F.2d 448, 455 (5th Cir. 1980), this Court "has never explicitly addressed whether the equal protection clause extends to illegal aliens". The Court's prior decisions holding aliens to be within the scope of the Equal Protection Clause have all involved aliens lawfully within the United States. *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291, 292 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1, 4-5 (1977); *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717, 718 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634, 636 (1973); *Graham* v. *Richardson*, 403 U.S. 365, 367-70 (1971). The issue of whether or to what extent the Equal Protection Clause applies to illegal aliens is thus squarely presented in the cases here under review.

The Fifth Circuit held in *Plyler* that appellees' children, illegal aliens, were within the purview of the Equal Protection Clause. Relying primarily on what it called the "simple language of the Fourteenth Amendment" and *dicta* from this Court's decision in *Wong Wing* v. *United States*, 163 U.S. 228 (1896), the Court reasoned that all persons physically present within territorial

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[36] Section one states in pertinent part that:

> No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

boundaries of the United States, regardless of the legality of that presence, were persons within the jurisdiction of their state of residence. *Plyler*, 628 F.2d at 454-56. The district court held likewise in its opinion in *In re Alien Children Education Litigation*, 501 F. Supp. 544, 570 (S.D. Tex. 1980), *aff'd mem.* (5th Cir. Feb. 23, 1981) (unpublished order).

FAIR contends that the conclusions of the lower courts on this issue are inconsistent with the prior decisions of this Court dealing with the degree of constitutional protection afforded to aliens in general and to illegal aliens in particular and are not mandated by the logic of the Court's cases extending the Due Process Clauses of the Fifth, and especially the Fourteenth, Amendments to illegal aliens.

A. *The Decisions of the Lower Courts Are Inconsistent With the Analytical Framework Established by This Court.*

The prior decisions of the Court dealing with the degree of constitutional protection to be afforded aliens have established an analytical framework in which an alien becomes entitled to an "ascending scale of rights" as his ties with this country increase and strengthen. *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950). This approach, grounded on the proposition that the Constitution clearly indicates that "the status of citizenship was meant to have significance in the structure of our government",[37] includes the corollary proposition that those among various classes of aliens nearest to the status of citizenship have a greater claim to the privileges and protections of citizens than those whose position is further from that status.[38] The Court has thus held that citizens, lawfully resident aliens, illegal aliens and nonresident aliens all stand on different constitutional footings, enjoying in that sequence a declining level of protection from the Constitution. *Compare Foley* v. *Connelie*, 435 U.S. 291 (1978) (lawfully resi-

[37] *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). *See also Sugarman* v. *Dougall*, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting).

[38] *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976) (upholding statutory distinction between "citizens and those who are most like citizens" on the one hand and "those who are less like citizens" on the other).

dent aliens may be barred only from certain limited types of employment reserved for citizens) *with De Canas* v. *Bica*, 424 U.S. 351 (1976) (illegal aliens have no federal right to employment of any sort); and *compare Mathews* v. *Diaz*, 426 U.S. 67 (1976) (illegal aliens are entitled to due process of law) *with Kleindienst* v. *Mandel*, 408 U.S. 753 (1972) (nonresident aliens have no right to due process of law).

The framework developed by the Court for the determination of the protections guaranteed aliens by the Constitution was perhaps best expressed in the Court's opinion in *Mathews* v. *Diaz*, 426 U.S. 67 (1976):

> [T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between an alien and this country: Congress may decide that as the alien's ties grow stronger, so does the strength of his claim to an equal share of that munificence.

Id. at 80 (emphasis in original).

Similarly, in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court stated that an alien obtains a gradually increasing scale of constitutional rights as his ties with this country increase.

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

339 U.S. at 770.

The Court has consistently applied this "ascending scale of rights" doctrine. In two recent cases, for example, the Court distinguished between the protections afforded under the Equal Protection Clause to citizens and lawfully resident aliens. *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (holding state could restrict certification of public school teachers to citizens and lawfully resident aliens who had expressed the intention to become citizens); *Foley* v. *Connelie*, 435 U.S. 291 (1978) (holding state could restrict employment as state police officer to citizens).

Moving down the scale, the Court has likewise clearly distinguished between lawfully resident aliens and illegal aliens. As noted above, the prior decisions of this Court explicitly dealing with the application of the Equal Protection Clause to aliens have all dealt with aliens lawfully present within the United States. In each of these decisions, the Court has carefully and consistently pointed this fact out. For example, the Court concluded in *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971), that the term "person" as used in the Equal Protection Clause "encompasses lawfully admitted aliens as well as citizens". Likewise, in *In re Griffiths*, 413 U.S. 717, 719-20 (1973), the Court stated that "a lawfully admitted resident alien is a 'person' within the meaning of the Fourteenth Amendment's directive that a State must not 'deny to any person within its jurisdiction the equal protection of the laws'." *Cf. Foley* v. *Connelie*, 435 U.S. 291, 294 (1978); *Truax* v. *Raich*, 239 U.S. 33, 39 (1915).[39] By its choice of language in these cases, the Court has by

[39] While there have been suggestions in *dicta* in several lower federal court opinions (other than those in the present cases) that illegal aliens are within the scope of the Equal Protection Clause, the decisions in those cases do not appear to rest on equal protection grounds. *See Holley* v. *Lavine*, 429 F.2d 1294 (2d Cir. 1976) (reversing district court holding that an illegal alien's claim of entitlement to equal protection of the laws failed to state a claim upon which relief could be granted); *Bolanos* v. *Kiley*, 509 F.2d 1023 (2d Cir. 1975) (holding that a deportable alien does not possess a constitutional right to remain in the United States for whatever period the resolution of claims by him against state officers may require); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971) (holding "bonded aliens" resident in jurisdiction have constitutional right of access to divorce courts; no determination of legality of residence); *Martinez* v. *Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936) (holding illegal aliens are entitled to access to court system).

negative implication steadily indicated that illegal aliens are not on a constitutional par with lawfully admitted aliens, at least insofar as the Equal Protection Clause is concerned.

The Court's decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976), similarly differentiates between the protections enjoyed by illegal aliens and lawfully resident aliens. The California statute challenged in that case prohibited an employer from knowingly employing an alien not lawfully resident in the United States if such employment would have an adverse effect on lawfully resident workers. The Court held the statute was not constitutionally invalid either as an intrusion into the exclusive federal power over immigration or as preempted by Congressional action. *Id.* at 356. The Court stated in its opinion that the illegal aliens dealt with by the California statute had "no federal right to employment" within the United States. *Id.* at 355. It is, on the other hand, well-established that lawfully resident aliens do have a constitutionally protected right to seek and maintain employment in this country, although not on a complete par with citizens. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (state may not constitutionally bar alien from employment as engineer); *In re Griffiths*, 413 U.S. 717 (1973) (practice of law); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (employment in state's classified civil service).

Finally, at the bottom of the scale are nonresident aliens seeking to enter this country who, for example, have no constitutional right of entry nor a constitutional entitlement to any process beyond what Congress chooses to provide. *See, e.g., Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Shaughnessy* v. *United States ex rel Mezei*, 345 U.S. 206 (1953).

In the context of this analytical framework, the Court's opinion in *De Canas* v. *Bica*, 424 U.S. 351 (1976), holding that illegal aliens have no federally protected right to employment in the United States, calls into serious question the applicability of the Equal Protection Clause to illegal aliens. The Court has stated previously that the right to seek and maintain employment on an equal basis is one of the most important rights protected from state deprivation by the

Equal Protection Clause. In *Truax* v. *Raich*, 239 U.S. 33 (1915), the Court, in holding that Arizona could not prohibit lawfully resident aliens from employment within the state, stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words.

239 U.S. at 41.

The Court has likewise characterized the state statutes barring aliens from employment, invalidated in *Sugarman*, *In re Griffiths* and *Flores de Otero*, as striking "at the noncitizens' ability to exist in the community", *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978), an ability which was protected by the Equal Protection Clause. Contrasted with those cases, the Court's decision in *De Canas* upholding the bar to employment of illegal aliens, when considered alongside the care with which the Court has extended the reach of the Equal Protection Clause exclusively to lawfully resident aliens, implicitly forecloses to illegal aliens a legitimate claim to the protection of that Clause.

B. *The Court's Decisions Extending Other Constitutional Protections to Illegal Aliens Do Not Support the Application of the Equal Protection Clause Here.*

In reaching their conclusions that the Equal Protection Clause applies to illegal aliens, the lower courts relied heavily on this Court's cases holding illegal aliens entitled to due process of law. *Plyler*, 628 F.2d at 454-56; *Alien Children*, 501 F. Supp. at 567-70. As discussed in the previous section, the Court's approach to the determination of the constitutional protections afforded to aliens in general is based on the nature of the alien's relationship with this country and the constitutional right implicated. Thus, a deter-

mination by the Court that illegal aliens are entitled to the protection of one particular constitutional provision (*e.g.*, due process of law) does not automatically yield the result that they are entitled to any other particular constitutional provision (*e.g.*, equal protection). The Court's decisions indicate, rather, that the application of constitutional protections to aliens should be examined on a case-by-case basis.

The Court has expressly stated that its decisions holding that aliens are entitled to due process of law do not mean that aliens are entitled to all other protections and privileges afforded to citizens. Thus in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), the Court observed:

> [t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.

Id. at 78. Likewise, in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976), the Court held that the protections provided by the constitutional guarantees of due process and equal protection "are not always coextensive" in the context of statutes drawing classifications based on alienage.

This recognized distinction among the embrace of different constitutional provisions, when combined with constitutional language restricting the Equal Protection Clause but not similarly encumbering the Due Process Clause,[40] leaves the Court free to maintain its established limitation on the application of the former Clause exclusively to lawfully resident aliens while not so limiting the latter Clause.

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[40] The Fourteenth Amendment proscribes the denial by a state of due process of law to "any person", while a state is prohibited from denying the equal protection of the laws to "any person within its jurisdiction". Although there does not appear to be any precedent which discusses how the phrase "within its jurisdiction" might relate to legality of presence, the Court has held that the phrase creates a positive limitation on the scope of equal protection. *Blake* v. *McClung*, 172 U.S. 239, 260-61 (1898). *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 & n. 17 (1976) (noting the difference in language in the two Clauses). Because appellees' presence in the United States violates federal law, declaring them not to be "within [the]

II. Section 21.031 of the Texas Education Code Does Not Violate the Equal Protection Clause.

The Court need not, however, reach in these cases the issue of whether and to what extent illegal aliens are protected by the Equal Protection Clause, since even if the Equal Protection Clause were held to apply, it would not be violated by section 21.031. Strict judicial scrutiny is not the appropriate standard of review of section 21.031 because illegal aliens are not and should not be held to be members of a suspect class and the education interest at issue here is not a fundamental one warranting protection by the Constitution. Under the rational basis standard, section 21.031 passes constitutional muster in that it bears a rational relation to at least two legitimate state purposes, protection of the financial integrity of the public school system and removal of a state-provided incentive to illegal immigration which exposes the state to litigation of the sort represented by *De Canas* v. *Bica*, 424 U.S. 351 (1976).

A. *Illegal Aliens Are Not Members of a Suspect Class.*

The Court's prior decisions applying strict judicial scrutiny to classifications distinguishing aliens from citizens rest principally on two lines of reasoning. First, lawfully resident aliens have been held to possess the traditional indicia of suspectness and thus to be a "prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). The second, grounded in the Supremacy Clause and the naturalization power, recognizes that the Constitution vests exclusive responsibility for regulation of immigration and naturalization in Congress and that state action disadvantaging aliens impermissibly interferes with the exercise of this power embodied in their lawful admission to this country. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de*

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jurisdiction" of the State of Texas within the intendment of the Fourteenth Amendment would give substance to language which cannot be read as superfluous. *Cf. Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (holding that an alien paroled into the United States pending the outcome of deportation proceedings was not "within the United States" within the meaning of section 243(h) of the Immigration and Nationality Act).

Otero, 426 U.S. 572, 602 (1976); *Graham*, 403 U.S. at 372, 377. Neither of the decisional bases of *Graham* and its progeny applies to illegal aliens.

One of the indicia of a suspect class which the court has identified is that the class is defined by "an immutable characteristic determined solely by accident of birth". *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Such a characteristic is present with respect to each of the three classes which have been held by the Court to be suspect: race, *Loving* v. *Virginia*, 388 U.S. 1 (1967); national ancestry, *Hernandez* v. *Texas*, 347 U.S. 475 (1954); and legal alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971). While the status of alienage is not immutable in the same sense as race or national ancestry in that aliens can generally apply for citizenship, it is a characteristic beyond the control of the alien for at least a certain period of time because of durational residency requirements imposed by Congress for the attainment of citizenship. *Foley* v. *Connelie*, 435 U.S. 291, 294 n.3 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1, 18-19 (1977) (Rehnquist, J., dissenting).

The characteristic which defines the class of illegal aliens, *i.e.*, the illegality of their presence in the United States, is neither immutable nor is it beyond the control of members of the class. It is a self-imposed characteristic which the aliens acquire by their very violation of federal laws.[41] As the Court stated in *Ambach* v. *Norwick*, 441 U.S. 68, 80 (1979), of lawfully resident aliens who refused to declare their intention to seek United States citizenship, illegal aliens have "chosen to classify themselves".[42]

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[41] While it is true that appellees' minor children cannot be held morally responsible for the violation of federal laws caused by their having been brought to this country, it is also true, as the Fifth Circuit pointed out in its opinion in *Plyler*, 628 F.2d at 457, that they are, like adult aliens, subject to deportation. 8 U.S.C. §1227 (1976).

[42] It should be noted that in both *Foley* and *Ambach* the Court indicated that strict scrutiny is not always the appropriate level of judicial review even when the classification is based upon the status of being a lawfully resident alien. In *Foley*, the Court stated that the state statute should be judged under the rational basis test since "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship'." 435 U.S. at 295, *quoting Nyquist* v. *Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting).

Perhaps even more fundamental to the court's consideration than the lack of some immutable characteristic defining the class of illegal aliens is the fact that they are a class of persons whose very presence in this country violates federal law. The increased judicial solicitude appropriate in the case of the suspect classes of race, ancestry and legal alienage is simply not appropriate when dealing with lawbreakers. *Boe* v. *Wright*, 648 F.2d 432, 441 n.18 (5th Cir. 1981) (Reavley, J., concurring).

The second basis articulated by the court for the application of strict scrutiny to statutory classifications affecting lawfully resident aliens, the plenary federal power over immigration, is plainly inapplicable to illegal aliens. The situation of illegal aliens is precisely opposite to that of lawfully resident aliens with respect to this ground, *i.e.*, the federal decision has been to exclude them, not to admit them. The principle enunciated in the prior cases thus applies, but with the opposite result: the state should be allowed to avoid undercutting the federal decision to exclude and exposing itself to legal challenge by eliminating state-created incentives to illegal immigration.

B. *The Educational Interest at Issue Is Not a Fundamental Interest Warranting Constitutional Protection.*

The Court's opinion in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 35 (1973), makes clear that education itself is not a fundamental interest which is explicitly protected by the United States Constitution. The Court did, however, state in *Rodriguez* that because of the relationship of education to other constituionally protected rights, particularly the right to free speech and the right to vote, there might be "some identifiable quantum of education" which might also be constitutionally protected. 411 U.S. at 36. The issue was left unresolved since the court found that the facts in *Rodriguez* revealed only a relative difference in spending levels for education in the school districts involved and did not amount to an absolute deprivation of education. 411 U.S. at 37. The district courts found in these cases that section 21.031 resulted in a total deprivation of education

from appellees' children. *Alien Children*, 501 F. Supp. at 557; *Plyler*, 458 F. Supp. at 580.

The view that section 21.031 results in an absolute deprivation of education from appellees' children is of dubious validity. First, there was evidence presented to the lower courts that some illegal alien children were attending the public schools on the payment of tuition, *Plyler*, 458 F. Supp. at 575, or were attending private schools in lieu of public schools, *Alien Children*, 501 F. Supp. at 561. More important, appellees are entitled to free public education in the Republic of Mexico, even if it may not be regarded as equivalent in quality to that provided in the United States. The Mexican Constitution makes elementary education obligatory and guarantees free public education through the university level to all Mexican citizens.[43] As will be shown,[44] it is reasonable to assume that appellees will ultimately be forced to comply with federal law and return to Mexico with their children. It is also reasonable to believe that Mexican parents, being no less devoted to their children's well-being than their counterparts in the United States, would insure that their children obtain an education by returning them to Mexico if they are in a practical sense barred from obtaining an education in the United States by a decision of this Court or otherwise.

Even assuming, *arguendo*, that the lower courts were correct in characterizing the effect of section 21.031 as a total deprivation of education to at least some of appellees' children, the inappropriateness of holding education to be a fundamental interest in the context of the present cases is that the *Rodriguez* rationale which might justify such a holding simply does not apply to illegal aliens. The fundamental difference between the situation envisaged by the *Rodriguez* court and the situation in the present cases is that there is no warrant to believe that illegal aliens will have occasion to take advantage of the other constitutional rights for the

[43] Constitution of Mexico, tit. I, ch. I, arts. 3(VI)-(VII) (translation published by General Secretariat of the Organization of American States (Washington, D.C. 1977)).

[44] *See* notes 45-46 *infra* and accompanying text.

effective exercise of which education is so important. The ready assumption on the part of all the lower courts that illegal aliens are, as one court put it, "here to stay", *Alien Children*, 501 F. Supp. at 558, mistakenly disregards the significance of their violation of law, to the application of the *Rodriguez* rationale and otherwise.

The implication seemingly sought to be drawn by the lower courts in their assumption the appellees' children will not be deported is that because Congress has not provided to enforcement agencies resources adequate to stop totally the flow of illegal aliens crossing our borders, it has somehow implicitly sanctioned or at least condoned their presence in this country. In fact, Congress has steadily increased the budget of the INS in recent years. As indicated previously, INS apprehensions of illegal aliens have increased dramatically in the last decade.[45] While it is widely acknowledged that manpower limitations have diminished the effectiveness of the INS, the difficulties in enforcement faced by the INS are in part attributable to the "enormous increase in illegal immigration over the past 20 years." *Blackie's House of Beef, Inc.* v. *Castillo*, Nos. 79-1057, *et al.*, *slip op.* at 18 (D.C. Cir. July 22, 1981). Writing for the court in *Blackie's*, Judge McGowan characterized the INS' exercise of its enforcement power as "vigorous" and "zealous" despite the agency's manpower limitations. *Id.* at 17, 18. Moreover, as discussed previously,[46] the issues surrounding immigration policy have received extensive consideration and study by both Congress and the Executive in recent years. Absent a strong showing to the contrary, FAIR would argue that courts should not indulge assumptions which would suggest that a coordinate branch of government will have any less commitment to law enforcement than the judiciary has.

Even if an illegal alien succeeds, by avoiding detection and deportation, in remaining in the United States for an extended period of time, he would certainly not be entitled to exercise the

[45] *See* text accompanying note 9 *supra*.

[46] *See* text accompanying notes 32-35 *supra*.

right to vote, one of the primary constitutional rights on which the *Rodriguez* decision focused. Illegal aliens working in the United States are generally barred from obtaining even permanent resident status,[47] much less the citizenship required to exercise the franchise. With respect to the relationship between First Amendment rights and education emphasized by the *Rodriguez* court, it is clear that even lawfully resident aliens do not enjoy the full protection of the First Amendment afforded to citizens.[48] Under the Court's ascending scale of rights analysis, illegal aliens would certainly not be entitled to a greater degree of protection than lawful resident aliens.

Lastly, the value of an education to an illegal alien, in practical economic terms, is substantially diminished, if not destroyed, by the Court's holding in *De Canas*. An affirmance of the lower court decisions in the present cases would mean that an illegal alien would be entitled to a free public education but could be denied an opportunity to use that education in a productive capacity. The incongruity of this situation should give the court pause in holding education to be a fundamental interest for equal protection purposes in the present cases.

C. *Section 21.031 Is Rationally Related to Legitimate State Purposes.*

Having demonstrated that the rational basis test is the appropriate standard of judicial scrutiny under which to judge the constitutionality of section 21.031, we argue here that section 21.031 does not violate the Equal Protection Clause in that it bears a rational relationship to the achievement of legitimate purposes. A statute is deemed to fail the rational basis only if it rests on grounds wholly irrelevant to the achievement of a legitimate

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[47] 8 U.S.C. §1255(c)(2) (1976 & Supp. III 1979).

[48] 8 U.S.C. §1251(a)(6) (1976 & Supp. III 1979) (permitting deportation of lawful aliens for advocacy of certain political beliefs and membership in organizations which advocate such beliefs). Congress' power to deport aliens on these grounds has been upheld against constitutional attack. *Galvan* v. *Press*, 347 U.S. 522 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Cf. Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963) (holding Government did not meet burden of proof but not questioning constitutionality of statute).

governmental objective. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). "A statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. Section 21.031 satisfies the standard established by the Court in *McGowan* and subsequent cases, and therefore, does not violate the Equal Protection Clause. *See Boe* v. *Wright*, 648 F.2d at 437 (Reavley, J., concurring).

1. *Section 21.031 Is Rationally Related to the Legitimate State Purpose of Protecting the Fiscal Integrity of and Quality of Educational Services Offered by the Texas Public School System.*

One state interest advanced by the State of Texas in support of section 21.031 is protection of the fiscal integrity of the public school system. A particular concern voiced by the State is the protection of those financially troubled school districts and schools in low income areas from the additional burdens of educating large numbers of illegal aliens who tend to be concentrated in such areas. Contrary to the conclusions reached by the lower courts in these cases, this Court has clearly held that the cost of a state or locally funded program is a legitimate state interest. *Dandridge* v. *Williams*, 397 U.S. 471, 479-80 (1970). *See also Boe* v. *Wright*, 648 F.2d at 437 (Reavley, J., concurring). This is the case even though cost may not be a sufficiently compelling interest to justify, in and of itself, a state classification where heightened levels of judicial scrutiny are deemed appropriate. *Graham* v. *Richardson*, 403 U.S. 365 (1971) (strict scrutiny); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (strict scrutiny); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (so-called "intermediate level" scrutiny).

There is no doubt that exclusion of illegal aliens from the provisions of free public education rationally serves this interest. Evidence presented to the lower courts in these cases amply demonstrates that the presence of increasing numbers of illegal alien school children in public schools in Texas has strained the limited resources of the independent school districts. *Alien*

Children, 501 F. Supp. at 580; *Plyer*, 458 F. Supp. at 590. Illegal alien children, principally because of language barriers, require more individual attention from teachers and are more costly to educate than the average child in the public school system. *Plyler*, 458 F. Supp. at 589. The provision of bilingual education services to these children is very costly[49] and may not be possible due to the severe lack of qualified teachers. *Alien Children*, 501 F. Supp. at 581; *Plyler*, 458 F. Supp. at 576. The evidence also indicates that illegal aliens generally reside in lower income areas served by schools which may be already financially strained. *Plyler*, 458 F. Supp. at 590; *Alien Children*, 501 F. Supp. at 580. The influx of new students puts an additional burden on these impoverished districts which they may not have the resources to meet.

There is another dimension to the state's classification which underscores its rationality. As discussed above,[50] the principal governmental interest behind the provision of free public education is the necessity of an educated citizenry to the preservation of our democratic form of government. The Court has recognized this connection between education and the ability to perform the duties of citizenship in our democratic society on numerous occasions. *Wisconsin* v. *Yoder*, 406 U.S. 206, 221 (1972); *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Since it is erroneous to assume that illegal aliens will remain in this country and that even if some do, they will be barred from exercising the rights of franchise and employment and will enjoy at most only limited rights of expression,[51] the principal state interests served by the provision of free public education would not in the main be served by permitting illegal aliens to attend free public

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[49] Bilingual education could become increasingly costly as a result of a recent decision holding that Mexican-American children of limited English proficiency have a constitutional right to bilingual services. *United States* v. *State of Texas*, 506 F. Supp. 405 (E.D. Tex. 1981). The court's order specified, *inter alia*, that bilingual education must be provided in most subjects and that batteries of tests upon initial entry and yearly thereafter must be given to gauge English proficiency progress. *Id.* at 439-41.

[50] *See* discussion in section II(B).

[51] *See* note 48 *supra* and accompanying text.

schools. Texas could therefore "reasonably have concluded that it should not dilute its limited resources by providing free public education to illegal alien children." *Boe* v. *Wright*, 648 F.2d at 436 (Reavley, J., concurring).

2. *Section 21.031 Is Rationally Related to the Legitimate State Purpose of Avoiding Litigation Against the State by Removing a Possible Federal Constitutional Infirmity in a State Statute.*

Although not expressly advanced by the State of Texas as a reason to support the enactment of section 21.031, it is reasonable to suppose that the state legislature would be sufficiently concerned about the possibility of litigation challenging the validity of a state statute on the ground that the statute encouraged illegal immigration in the face of a contrary federal policy that it would take steps to eliminate such a possibility. At least three reasons for such a concern are apparent.

First, since the supposed target of the litigation would be a product of the legislature's own making, it could naturally seek to reduce the legal vulnerability of the statute at issue as part of its public duty to legislate responsibly. Second, since Texas is a border state with particularly vexing problems arising out of illegal immigration, the legislature possesses a special obligation to its constituents to insure that the laws of the state are crafted so as to not conflict with federal regulation of immigration designed to deal with those problems. To put it another way, the legislature could have reasonably seen it necessary "to avoid an incentive to illegal immigration that it would otherwise create by its own laws and with the public's money." *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring). Third, since litigation challenging a state statute on federal constitutional grounds could result in protracted proceedings requiring a significant commitment of the state's resources including legal manpower from the executive, the legislature could out of a desire to secure efficiency in state government seek to remove a potential drain on the executive which such litigation would constitute.

As noted before,[52] one of the doctrinal bases of the Court's decisions involving equal protection challenges to state statutes adversely affecting lawfully resident aliens is the plenary federal power over immigration and naturalization. *E.g.*, *Flores de Otero*, 426 U.S. at 602. The situation presented in the instant cases is the mirror image of that in those earlier cases. In the present cases, the clearly expressed decision of Congress is that neither appellees nor their children should have entered or be permitted to remain in this country. Just as a state may not create disincentives which undercut Congress' decision to admit aliens to this country, by the same token a state should not be permitted to provide or perpetuate incentives which would frustrate the federal decision to exclude. At the very least, a state should be allowed to remove an incentive which it sees as contrary to such an overriding federal policy, and thereby remove an invitation to litigation.

The provision of free public education by the states is plainly an incentive to illegal immigration, even if it is not the primary incentive. At the very least, it is an incentive for illegal alien parents such as appellees to bring their children here, if not an incentive for the parents themselves to come. *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring) ("Can it be denied that free education is an incentive to move across the Rio Grande?"). *Cf. Graham*, 403 U.S. at 376-80 (withholding welfare benefits discourages entry into states); *Shapiro* v. *Thompson*, 394 U.S. 618, 632 (1969) (recognizing parents will move to take advantage of better educational facilities for children). Free public education is an incentive for aliens not only to enter this country, but also to remain here illegally, for a more subtle impact of the provision of free education and other benefits to illegal aliens may be to turn seasonal visitors into full-time residents by causing them to drop out of the seasonal cycle of migration[53] to take advantage of permanent residence.

There is a substantial basis to believe that the creation or tolerance of such an incentive is exposed to a charge of being un-

[52] *See* discussion in section II (A) *supra*.

[53] *See generally* M. Pyle, Birds of Passage (1979), chs. 3 and 7 (discussing process of migration).

constitutional under the Supremacy Clause. The Court has indicated that state action must be invalidated where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977); *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U.S. 714, 722 (1963); *Hill* v. *Florida*, 325 U.S. 538, 542 (1945). The Court in *De Canas*, concluded that the California statute barring employment of illegal aliens was "consistent" and "harmonious" with federal immigration laws. 424 U.S. at 357, 358. By the same reasoning, a state policy of providing free public education to illegal aliens is inconsistent and unharmonious with federal immigration policy because it would likely impede the accomplishment of Congress' stated goals, and would be "contrary to and in conflict with national immigration policy as established by Congress". *Boe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring).

Reference to *De Canas* serves another purpose. *De Canas* exemplifies the proposition that a lawsuit by persons aggrieved over public or private behavior concerning illegal aliens is reasonably foreseeable. A legislature could well envision actions, similar to those commenced by public entities,[54] brought by citizens or lawfully resident aliens, alleging harm to their children's school system and challenging a state statute which granted free public education to illegal aliens on the ground that it was preempted by the federal decision to exclude such persons from this country.

Beyond the state's legitimate concern that it may be exposed to costly litigation on the basis of a conflict between one of its statutes and an overriding federal policy, a state should be permitted to repeal parts of a state statutory scheme if and when it becomes evident that statutory policy would tend to frustrate the achievement of the federal policy. Considerations of appropriate relations between the states and the federal government would seem to dictate deference to a clearly expressed federal policy in an area such as immigration where federal power is so clearly preeminent.

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[54] *See* notes 27-28 *supra*.

Thus, by reference to the interest of eliminating the risk of litigation as well as to considerations of appropriate federal-state relations, section 21.031 does not contravene the requirements of the Equal Protection Clause as measured under the rational basis standard and when the state's interest in the fiscal integrity of its public school system is added, the statute should pass constitutional muster under even more exacting standards.[55]

Conclusion

America is a nation of immigrants. The pluralism of our society is one of its greatest triumphs. The individual contributions of the outstanding among these immigrants are too numerous to mention. FAIR regards the richness of diversity in our population a characteristic which we must always encourage by welcoming peoples of all lands through an equitable and rational immigration policy. Nothing else would be consistent with the generous, humanitarian character of the American people. The beacon of freedom which the United States casts throughout the world gives our nation a particular responsibility to open its doors to refugees fleeing oppression.

But just as our forebears, who at first recognized no quantitative restrictions on immigration, came to believe in the necessity of imposing controls on the numbers of foreign nationals who could lawfully cross our borders, so now is the time for a conscious recognition in our national policy that we have entered an age of limitation. No longer is our frontier unbounded, nor our resources apparently limitless. Yet simultaneously with our realization over

[55] The lower courts' reliance on the argument that Texas failed to adopt the most effective measure to deal with the problems created by the presence of illegal aliens, *i.e.*, prohibit employers from hiring illegal aliens, is misplaced. The inducement to illegal immigration created by employment opportunities comes principally from the private sector of the economy, whereas the incentive created by free public education comes from state and local governments. *Doe* v. *Wright*, 648 F.2d at 439 (Reavley, J., concurring). Texas could have reasonably concluded that as a constitutional matter it was more important to eliminate the incentive which it had created by its affirmative policy than the incentive created by the private sector. *Id.*

the last decade that jobs, oil and government services are not as abundant or available as we once thought them to be, we have experienced an unprecedented surge of illegal entrance into this country by people who once respected our laws enough to wait until they qualified for lawful admission. We are now at an historic crossroad which requires that our attitudes release their grasp on outdated verities and accommodate to the new realities.

The dilemma presented by the cases now before this Court is symptomatic of the quandary in which current circumstances place the entire country. No one wishes to deny these claimants an education for their children. But lines must be drawn to secure respect for the law, because otherwise, the opportunity for the country to respond effectively to troublesome and complicated trends which have only recently emerged can be critically handicapped at precisely the moment when national leadership needs the flexibility to fashion policies appropriate to the times.

Respectfully submitted,

JOSEPH C. ZENGERLE
MARC A. REARDON

BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20036
Tel: (202) 822-9320

Attorneys for Amicus Curiae,
Federation for American
Immigration Reform

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, *et al.*,

Appellants,

v.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, *et al.*,

Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,

Appellants,

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,

Appellees.

Consolidated Appeals From The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY OF SAN FRANCISCO

PETER B. SANDMANN
TURNER & SANDMAN
354 Pine Street
San Francisco, CA 94104
(415) 391-8100

ROBERT F. KANE
P.O. Box 5909
Tahoe City, CA 95730
(916) 583-0164

JOAN M. GRAFF
FELIX VELARDE-MUNOZ
LEGAL AID SOCIETY OF SAN FRANCISCO
693 Mission Street, 7th Floor
San Francisco, CA 94105
(415) 495-6420

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Does the Plain Language of the Equal Protection Clause of the Fourteenth Amendment Which Prohibits a State From Denying Equal Protection of the Laws to Persons Within Its Jurisdiction Cover Undocumented Children?

2. Does Section 21.031 of the Texas Education Code Which Effectively Denies Undocumented Children Residing in the State of Texas a Public Education Guaranteed to Lawfully Resident Alien and Citizen Children Constitute a Denial of Equal Protection of the Laws?

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In The Supreme Court

Of The

United States

NOS. 80-1538 AND 80-1934

PLYLER, et al.,

Appellants,

vs.

DOE, et al.,

Appellees.

STATE OF TEXAS, et al.,

Appellants,

vs.

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,

Appellees.

BRIEF OF AMICUS CURIAE

STATEMENT OF INTEREST

The Legal Aid Society of San Francisco [hereinafter the Society] is a private non-profit corporation organized under the laws of the State of California providing legal services to persons who could not otherwise afford them. In addition to providing direct services to individuals in need of legal representation, the Society maintains a role in addressing public issues which impact on the rights of the individuals and groups it represents.

Among the major issues and cases in which the Society has been involved are: Lau v. Nichols, 414 U.S. 563 (1974) wherein this Court recognized the right of monolingual Chinese speaking students to equal educational opportunities in the San Francisco public schools; and Hampton

v. Mow Sun Wong, 426 U.S. 88 (1976) which involved equal access to Federal employment for resident aliens. The Society has the requisite expertise and interest to address the issues presented by the consolidated cases before the Court today.

QUESTIONS PRESENTED

1. Does the Plain Language of the Equal Protection Clause of the Fourteenth Amendment Which Prohibits a State From Denying Equal Protection of the Laws to Persons Within Its Jurisdiction Cover Undocumented Children?

2. Does Section 21.031 of the Texas Education Code Which Effectively Denies Undocumented Children Residing in the State of Texas a Public Education Guaranteed to Lawfully Resident Alien and Citizen Children Constitute a Denial of Equal Protection of the Laws?

STATEMENT OF THE CASE

Amicus relies on the Appellees in this consolidated appeal to set out the full factual setting of these cases.

ARGUMENT

Amicus Curiae respectfully urges that judgments below be affirmed. The plain language of the Equal Protection Clause and relevant case law establish that undocumented children are covered by the guarantees of equal protection of the laws. The Courts below correctly found that Texas Education Code §21.031 which effectively denies undocumented children residing in Texas access to public education guaranteed to citizen and lawfully resident alien children was a denial of equal protection of the laws. Such a

result is consistent with constitutional values of fairness.

Texas Education Code Section 21.031 is preempted by Federal law. Under the tests developed by this Court, the Texas statute deals with an area that is the exclusive province of the Federal government in that the statute places burdens on children whom the Federal government has allowed to remain within the United States. Furthermore, the statute is preempted in that it unduly burdens both Federal Immigration and Education policies by denying a group of alien children access to education.

I. THE GUARANTEES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT EXTEND TO UNDOCUMENTED CHILDREN AS WELL AS CITIZEN AND LAWFULLY RESIDENT ALIEN CHILDREN.

The Fourteenth Amendment in pertinent part provides:

> "No state shall ... deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV [emphasis added]

The Court of Appeals, below, held that:

> "... [a]ll aliens - even those illegally within the territorial boundaries of the United States are entitled to the equal protection of the laws." Doe v. Plyler, 628 F.2d 448, 454 (5th Cir. 1980).

This holding was followed in the Fifth Circuit's summary affirmance in In Re Alien Children Education Litigation, ___ F.2d ___ (5th Cir. 1981).

It is clear from opinions of this

Court that the due process protections of the Fourteenth Amendment extend to aliens, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), even if they are in the United States illegally or without documents. Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States, 345 U.S. 206, 212 (1953). The Fifth Circuit's holding in Doe v. Plyler, supra, extends the Fourteenth Amendment protections afforded illegal aliens to include equal protections for undocumented children.

The language of the Equal Protection Clause is straight forward and reads that "all persons within the jurisdiction of a state" are afforded the equal protections of the law. (emphasis added) 1/ It is

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1/ Such protection "is a command which the State must respect, the benefits of which every person may demand", the least deserving as well as the most virtuous. Hill

(continue next page)

firmly established that aliens, adults or children, lawfully admitted into the United States are persons and as such are afforded the guarantees of the Equal Protection Clause of the Fourteenth Amendment for purposes of reviewing state action. 2/ We will not burden the Court with reiterating the reasons why the Equal Protection Clause of the Fourteenth Amendment protects undocumented aliens as that is set out in Appellees' briefs and was the ruling of the Fifth Circuit in Doe v. Plyler, supra, 628 F.2d at 454-56.

1/ (cont. from previous page) v. Texas, 316 U.S. 400, 406 (1942).

2/ Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Board v. Flores de Otero, 426 U.S. 572 (1976); In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

See also Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975).

This Court is not asked to determine that illegal aliens in all situations are protected by the Equal Protection Clause. Rather this Court is being presented with a narrow question of whether children of illegal aliens, who are undocumented by virtue of their parents' status alone, are to be granted the fundamental guarantees provided by the Equal Protection Clause. 3/

3/ In the specific circumstances of this total denial of educational opportunities to undocumented children, we agree with the statement of the Fifth Circuit rejecting the proposition that due process guarantees, to which these children are undeniably entitled, are somehow more basic to "our constitutional scheme" than guarantees of equal protection. Doe v. Plyler, supra, 628 F.2d at 456 n. 18. Compare Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

The undocumented children in the cases at bar, although not lawfully admitted aliens, are under no order of deportation, are not necessarily deportable, and are likely to remain permanently in this country. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1328 (1980)(Powell, J., in chambers). These children owe their place of residence to the actions of their parents. 4/ This Court has recognized the need to afford illegitimate

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4/ The State of Texas by statute recognizes the authority parents exercise over their children, [Texas Fam. Code §12.04(1) (Vernon Supp. 1980)], and grants parents the right to have physical possession of their children and the right to determine or establish the legal residence of their children. Additionally, §12.04(2) of the Texas Family Code imposes a duty on parents to control their children.

children the coverage of the Equal Protection Clause when they are denied benefits through no fault of their own. 5/ Similarly, undocumented children residing within this country should not be denied equal protection due to actions over which they had no control. Recognizing that undocumented children are covered by the Equal Protection Clause is consistent with underlying constituional values of fairness.

5/ Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating an Illinois statute that totally barred illegitimate children from inheriting from fathers who died intestate); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidating state statute that denied dependent illegitimate children recovery under worker's compensation law for the death of their father); and Levy v. Louisiana, 391 U.S. 68 (1967) (invalidating provisions of the Louisiana wrongful death statute excluding illegitimates from the class of children entitled to recover for a parent's death.

To deny these children the equal protection of the law would in effect doom them to a life of the most marginal nature. As the court below stated:

> "[D]enying a person a basic education is tantamount to ensuring that the person remains at the lowest socio-economic level of modern society, ..." Doe v. Plyler, supra, 628 F.2d at 451. 6/

The treadmill of social and economic oblivion to which they would be relegated without education could lead to a life of crime, delinquency and despair. The action of the State of Texas, in an attempt to save money now, could:

> "develop and foster a ghetto of ignorance, with ... untrained and untutored ... children ... roaming the streets, this with the concomitant evils of crime,

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6/ See also Id. at 451 n. 8.

immorality and general social degeneracy." Hosier v. Evans, 314 F. Supp. 316, 321 (D.V.I. 1970).

II. TEXAS EDUCATION CODE SECTION 21.031 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR SECTION 21.031.

The State of Texas, by enacting Section 21.031, has created two classes of children. The first class is made up of children who are citizens or lawfully admitted aliens who are eligible for tuition free education, irrespective of whether their parents contributed to the financial base of the Texas public schools. The second class is composed of non-citizen alien children who are in the United States without legal documentation and are not eligible for

tuition free education even if their parents contribute to the tax base that supports public education in Texas. As detailed below, there are three separate bases for finding that this second class of children is entitled to have this Court strictly scrutinize the discrimination wrought by Section 21.031.

1. Undocumented Children Are Within The Class 'Aliens' For Purposes Of Determining Appropriate Standard Of Review.

The classification of undocumented children created by Texas Education Code Section 21.031 [hereinafter referred to as §21.031] is based on alienage. Decisions of this Court have established that state created classifications based on alienage are inherently suspect and subject to close judicial scrutiny.

Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Mathews v. Graham, 403 U.S. 365, 372 (1971); Examining Board v. Flores de Otero, 426 U.S. 572, 601-02 (1976); In Re Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973). 7/ This is in recognition of

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7/ This Court has acknowledged a limited exception to this rule in Amback v. Norwick, 491 U.S. 68 (1979) and Foley v. Connelie, 435 U.S. 291 (1978). In those cases a more relaxed standard of review was applied to instances in which a state excludes aliens from participation in the political community. The rationale for those decisions is that some "state functions are so bound up with the operation of the State as a governmental entity" as to allow the exclusion of individuals who have not become part of the process of self-government. Amback v. Norwick, supra, at 73-74. The case before the Court today does not involve individuals who wish to participate as agents of the state in governmental operations as was true in Amback and Foley. The facts of this case are much more closely analogous to the facts in Graham v. Richardson, 403 U.S. 365 (1971), wherein this Court applied a strict scrutiny standard to a classifica-

(cont. on next page)

the fact that aliens, as a class, are a prime example of a "discrete and insular" minority, United States v. Carolene Products Co., 304 U.S. 144, 152-53, n. 4 (1938), and that it is appropriate to afford them heightened judicial solicitude. Graham v. Richardson, supra, at 372.

Section 21.031 is not saved from strict scrutiny simply because it does not burden all alien children. In Nyquist v. Mauclet, supra, this Court invalidated a New York statute that barred certain, but not all, aliens from state financial assistance for higher education. There the Court stated:

> "The important points are that [the statute] is directed at aliens and that only aliens

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7/ (cont. from previous page)
tion based on alienage that was used to exclude individuals from eligibility for state welfare benefits.

> are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." 432 U.S. at 9.

Similarly, in Graham v. Richardson, supra, note 7, an Arizona statute with a 15 year residency requirement for aliens to be eligible for welfare benefits was struck down as violating equal protections guarantees. These cases make it clear that though a statute may create a classification which burdens only a portion of a protected group, it does not negate the fact that the classification itself is suspect. Mathews v. Lucas, 427 U.S. 495, 504-05 n. 11 (1976); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 169, 172 (1972). 8/

8/ See also Moreno v. Toll, 489 F. Supp. 658, 660-62 (D. Md. 1980).

Here, although the undocumented children are not lawfully admitted aliens, they are or will become permanent residents of this country. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1328 (1980)(Powell, J., in chambers). To allow a state to discriminate against this group of aliens without compelling reasons would be contrary to this Court's prior holding regarding aliens.

2. The Distinction In §21.031 Singling Out Undocumented Children For Differential Treatment Is A Suspect Classification.

Second, the undocumented children discriminated against by Section 21.031 constitute a suspect class of individuals

based on criteria established by this Court. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1972) and United States v. Carolene Products Co., supra, at 152-53 n. 4. First, like aliens generally, they constitute a discrete and insular minority. See Graham v. Richardson, supra, at 372. Most undocumented children in Texas are of Mexican ancestry. 9/ Consequently, they share with other ethnic and racial minorities, physical, cultural, and language characteristics that set them apart from the Anglo majority and make them identifiable as a distinct group. (See

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9/ See Doe v. Plyler, supra, 628 F.2d at 451 n. 6. See also, Ortega, "The Plight of the Mexican Wetback", 58 A.B.A.J. 231, 251 (1972).

Keyes v. School District No. 1, 413 U.S. 189, 197-198 (1973).) Like undocumented aliens generally, undocumented children have historically been the target of purposeful legal, economic and social discrimination and exploitation. 10/ As a group, undocumented children, specifically, and undocumented aliens, generally, are politically powerless. San Antonio Independent School District v. Rodriguez, supra, at 28. Like lawfully resident aliens, undocumented aliens are not guaranteed the opportunity to vote and therefore cannot directly participate in the political process.

10/ See also Kane and Velarde-Munoz, "Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Educaiton," Hastings Con. Law Quart., Winter 1978, text accompanying notes 50-55.

Sugarman v. Dougall, supra, at 649. The political powerlessness of undocumented children is further exacerbated by the fact that they are minors and must rely on their parents to protect their interests.

Moreover, the classification, as indicated earlier, is based, like race, national origin, illegitimacy, on a characteristic over which the children have no control [11/] and violates a fundamental concept in the American scheme of justice that individuals are to be free of legal disabilities in the absence of personal guilt. St. Ann v. Palisi, 495 F.2d 423, 425-426 (5th Cir. 1974). The statute

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11/ See Weber v. Aetna Cas. & Sur. Co., supra, at 175-76 (illegitimate children have no control over their status and ought not be made to suffer on account of it).

creates legal and practical burdens for undocumented children for reasons totally unrelated to their worth as individuals. Consequently, these children fit the criteria this Court has set which warrant the extraordinary judicial protections afforded a suspect class.

3. Section 21.031 Should Be Subject To Strict Scrutiny Because It Effectively Denies Education Totally To Undocumented Children.

Finally, strict scrutiny is the appropriate standard of review when legislative action burdens constitutionally protected fundamental rights and interests. Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974); San Antonio Independent School District v. Rodriguez, supra, at 33-34; Shapiro v. Thompson, 394 U.S. 618, 634 (1969). In Rodriguez, supra, at 36-37, this Court examined whether a state

financing scheme that created financial disparities among school districts violated the Equal Protection Clause. While upholding the Texas scheme of financing, and rejecting arguments that any differences in the provision of education be subject to strict scrutiny, the Court expressly left open the questions of whether the absolute denial of education might impinge on a constitutionally protected right. Id. at 36-37.

The situation of undocumented children in Texas schools differs radically from the circumstances of the children in Rodriguez. In contrast to the differential spending levels involved in Rodriguez, Section 21.031 effectively denies education to all undocumented children. In upholding the financing scheme in Rodriguez, this Court noted that its

underlying purpose was to extend and improve education. Id. at 39. By contrast, the purpose and effect of Section 21.031 is to selectively deny education to a class of politically unpopular children. Consequently, this case squarely presents the question left open in Rodriguez.

As was pointed out by Justice Powell in Rodriguez, supra, education is not afforded "explicit protection under our Federal Constitution." Id. at 35. However, a right need not be explicitly mentioned in the Constitution to be considered fundamental. "Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." Id. at 34-35. [emphasis added]

The importance of education in the twentieth century cannot be overstated. This Court has long recognized the importance of education in this society and the central role of the government in providing it. Wisconsin v. Yoder, 406 U.S. 205 (1972); Brown v. Board of Education, 347 U.S. 483 (1954); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). In Brown v. Board of Education, supra, this Court, in striking down the "separate but equal" system of public education stated:

> "Today education is perhaps the most important function of state and local governments.... Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and

> in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493. [emphasis added]

Elsewhere it has been recognized by this Court that an individual can be severely harmed as a result of the denial of education for more than a "trivial" period. Goss v. Lopez, 419 U.S. 565, 576 (1975) (ten-day suspension).

Education is also important with respect to the enjoyment and exercise of rights that are clearly protected by the Constitution. See generally, San Antonio v. Rodriguez, supra, at 36-37. Education of some minimum level is necessary for exercising freedom of speech, petitioning government, and due process

of law. First Amendment rights have been recognized as fundamental. Cox v. Louisiana, 379 U.S. 559, 563 (1964). See also De Jonge v. Oregon, 299 U.S. 353, 364 (1937). The right to due process is expressly guaranteed in the Fifth Amendment and extends to illegal aliens. Shaughnessy v. United States, supra, at 213-214. Total denial of education as would be occassioned by Section 21.031, would leave undocumented children without basic skills necessary to protect themselves through the exercise of such rights.

Education is important not only with respect to individual development and the exercise of constitutionally protected rights. Education is important for the maintenance of our social order. Amback v. Norwick, supra, at 75-77; Wisconsin v.

Yoder, supra, at 221. Education is an essential element in the process which prepares individuals to participate in society in a meaningful and productive way. Brown v. Board of Education, supra, at 493.

The evidence produced in the district court proceedings below established that the class of undocumented children who are effectively excluded from education by Section 21.031 will not soon leave Texas or the United States. 12/ The disparities between the economic conditions in Mexico and the United States that have drawn this group into this country will not soon change. The

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12/ Doe v. Plyler, 458 F. Supp. 569, 577-78 (E.D. Tex. 1978); In re Alien Children Ed. Litigation, 501 F. Supp. 544, 562 (S.D. Tex. 1980).

practical realities of the inability of federal authorities to effectively and strictly enforce the Immigration and Naturalization Act means that undocumented children as a class will continue to reside in Texas. Moreover, it is also clear that a large percentage of the children in Texas who today are undocumented will become lawfully resident aliens in the near future. Doe v. Plyler, supra, 458 F. Supp. 560, 577-78 (1978).

The failure to provide education to this class of individuals will result in the creation of a sub-group within our midst who are condemned to ignorance, and who will look to public sources or crime to meet their day-to-day needs of food and shelter. The end result of such discrimination will be the increased,

long term drain on governmental resources and, more important, the loss of valuable human resources that have been reduced to wasted lives.

4. Section 21.031 Cannot Be Sustained Under A Strict Scrutiny Examination.

Classifications which are suspect in nature or which impact upon fundamental rights or interests are subject to "the most rigid scrutiny", Loving v. Virginia, 388 U.S. 1, 11 (1967). A state must show that the classification is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The classification created by Section 21.031 cannot withstand this stringent examination.

The State of Texas has asserted two bases or interests to be served by §21.031

as it relates to undocumented children:

1. The preservation of the state's limited educational resources and their expenditure to lawful residents; and
2. The reduction of incentives for illegal immigration.

AOB 25

This Court has repeatedly held that discrimination cannot be sustained where the claimed interest of the state involves simply the savings of dollars or the reserving of those dollars for particular groups. 13/

13/ See Nyquist v. Mauclet, supra, at 12; Memorial Hospital v. Maricopa County, supra, at 374-75; Shapiro v. Thompson, supra, at 638.

The stated interest of Texas in preserving education funds for some children residents of Texas is not a sufficient basis for making a distinction as invidious in nature as the one which would single out undocumented children for differential treatment. This is especially true given the importance of education to the development of these children, the importance of maintaining our social fabric and the fact that undocumented aliens do contribute to the taxes which are the source of funding for public education in Texas.

The second interest proffered by Texas is an impermissible goal for the State and inconsistent with federal authority. In Nyquist v. Mauclet, supra, the state of New York had asserted, as a basis for

banning certain resident aliens from state financial assistance for higher education, that the provision was an incentive for aliens to become naturalized. Id. at 9. This Court stated that such a purpose was not a permissible one for the state: "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." Id. at 10. (Citing U.S. CONST., art. 1, §8, cl. 4; Mathews v. Diaz, supra, at 67, 84-85; Graham v. Richardson, supra, at 376-80; Takahashi v. Fish and Game Comm'n, supra, at 419.) Cf. DeCanas v. Bica, 424 U.S. 351 (1976). Likewise, in this situation, state legislative attempts to provide disincentives to illegal immigration are outside the scope of state authority.

In summation, Section 21.031 creates

a classification which is both invidious and pernicious in nature. It burdens innocent children for the conduct of their parents. At the same time the statute effectively denies these children access to one of the most basic services provided by government today, education. Not only is education vital to the success of any individual, it is the cement of a democratic society. Texas in defense argues that Section 21.031 is necessary to save money. Such a defense cannot withstand judicial scrutiny. Surely, we are at a stage in the development of our country when human life has value beyond dollars and cents and the guarantees of the Fourteenth Amendment's Equal Protection Clause can reach naturally to encompass innocent children.

B. SECTION 21.031 IS INVALID UNDER AN INTERMEDIATE STANDARD OF REVIEW

While this Court has never explicitly employed a standard of review other than "strict scrutiny" or "national basis", and remains reluctant to do so, Rostker v. Goldberg, __ U.S. __, 49 U.S.L.W. 4798, 4801-02 (1981), several decisions demonstrate the Court's application of an intermediate standard of review where certain classifications have been used and where important, if not "constitutionally fundamental", interests have been adversely impacted. This Court has applied a more "focused" review, Craig v. Boren, 429 U.S. 190, 210-11 (1976)(Powell, J., concurring), where classifications have been employed based on sex, Craig v. Boren, supra; Stanton v. Stanton, 421 U.S. 7 (1971); and illegitimacy, Trimble v.

Gordon, supra; Mathews v. Lucas, supra; Weber v. Aetna Casualty & Surety Co., supra. Also subject to a heightened review have been classifications which deny to persons certain benefits basic to survival. Hampton v. Mow Sun Wong, 426 U.S. 88, 103-103 (1976)(eligibility for employment in a major sector); United States v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring)(food stamps subsistence benefits).

The arguments in support of an intermediate level of review are much the same as the arguments in support of the utilization of the "strict scrutiny" standard. The criteria used by the State of Texas in Section 21.031 is aimed at a group with a history of disadvantageous treatment similar to racial and ethnic minorities, illegitimate children and aliens

generally. They share with the aforementioned groups political powerlessness and societal approbation sufficient to elicit a review of Section 21.031 by this Court of a heightened nature.

Additional justification for a more focused review of Section 21.031 is the fact that the classification impacts on an interest that this Court has recognized as being basic to individual development. The sentiments expressed in Brown v. Board of Education, supra, are as compelling, if not more so, today as they were then, because the present case involves a total denial of education opportunity and are not simply a matter of relative deprivation of education as was the case in Brown, supra, and Rodriguez, supra.

To withstand constitutional challenge

under an intermediate review, a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, supra, at 197. The Texas statute does not meet this test.

Texas' stated interest in preserving the fiscal integrity of its public program, AOB 25, is not substantially met by the classification in Section 21.031. The State of Texas conducted no studies to discern what fiscal impact undocumented children might have on the schools in Texas. In re Alien Children Education Litigation, supra, 501 F. Supp. at 574.

The fiscal savings which would accompany the exclusion of undocumented children from public education are unknown and illusory at best. The findings of both district court below and the

Fifth Circuit are that undocumented children are no more a drain on education resources than are citizen and lawfully resident alien children. Doe v. Plyler, supra, 458 F. Supp. at 589; 628 F.2d at at 461 n. 34; In re Alien Children Education Litigation, supra, at 583 n. 104. The educational needs of even monolingual Spanish speaking undocumented children are similar to those of recently admitted lawful resident alien children and large numbers of citizen children of Mexican-American ancestry. The Texas school system is already providing programs to meet the needs of undocumented children, English speaking or Spanish speaking.

C. SECTION 21.031 IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

Appellees in Plyler v. Doe, No. 80-1538, have extensively brief this issue. Amicus concurs with and supports the arguments stated by Appellees that Section 21.031 is not rationally related to a legitimate state interest.

III. TEXAS EDUCATION CODE SECTION 21.031 MUST BE PREEMPTED BY FEDERAL LAW

A state law which discriminates against undocumented aliens is preempted by federal law if either of three tests are met. First, it is preempted if "Congress has unmistakenly so ordained." DeCanas v. Bica, 424 U.S. 351, 356-358 (1976). Second, it is preempted if "the regulated subject matter permits no other conclusion". Id. at 356. Third, it is

preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 363; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

In DeCanas v. Bica, this Court held that a California statute which prohibited employers from hiring "illegal aliens" under certain conditions was not preempted under either of the first two tests. Id. at 356. This Court did not analyze the statute under the third test, but rather remanded the case for that analysis. Prior to DeCanas, this Court held in Hines v. Davidowitz, supra, that a state law requiring aliens to register was preempted under the third test.

The Texas statute at issue differs significantly from the statute before

the Court in DeCanas. Section 21.031 impacts directly on undocumented children and deals with areas of federal immigration and education policies embodied in the Immigration and Naturalization Act [8 U.S.C. §1101 et seq.] and Title 1 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. §241 et seq.].

The supremacy of federal power to regulate immigration is unquestioned. DeCanas v. Bica, at 354; Hines v. Davidowitz, supra, at 62. Although regulation of education, like employment, is generally a matter of local concern, such regulation "must give way to paramount federal legislation." DeCanas v. Bica, supra, at 357. In areas of unquestioned vital significance to the nation as a whole, such as foreign affairs, which

itself encompasses the regulation of aliens and immigration, state legislation is particularly susceptible to preemption. MITE Corp. v. Dixon, 633 F.2d 486, 491 (7th Cir. 1980) Prob. Jur. noted, __ U.S. ___, 101 S.Ct. 1510, 68 L.Ed.2d 347 (1981); Hines v. Davidowitz, supra, at 62; Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). Where federal legislation is paramount, this Court has not hesitated to preempt state statutes regulating matters of local concern. 14/ Although Congress did

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14/ See: Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (state statute which discriminated against nonresidents and aliens regarding fishing in state territorial waters preempted by federal law); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (federal law preempts division of benefits under Railroad Retirement Act); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (application of state tax to non-Indian logging company operating on Indian reservation preempted by

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not expressly prohibit the state statute at issue, this statute impacts on both immigration and education policies. When analyzed under the latter two preemption tests, the statute must be invalidated.

A. THE NATURE OF THE SUBJECT MATTER REGULATED REQUIRES THAT IT BE PREEMPTED UNDER THE IMMIGRATION AND NATURALIZATION ACT.

Under the second test, preemption is implied from the structure and purpose of Congressional enactments. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973); MITE Corp. v. Dixon, supra, 633 F.2d at 490-92. This inquiry requires consideration of the relation-

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14/ (cont. from previous page) federal law); McCarty v. McCarty, __ U.S. __, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (federal law preempts division of military retirement pay pursuant to state community property laws).

ship between state and federal law as they are interpreted and applied, not merely as they are written. MITE Corp. v. Dixon, supra, at 491; DeCanas v. Bica, supra, at 363-65.

"The authority to control immigration -- to admit or exclude aliens -- is vested solely in the Federal Government." Truax v. Raich, supra, at 42. The Immigration and Naturalization Act is concerned "with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." DeCanas v. Bica, supra, at 359. It is presumed that Congress intended to preempt state action in this area. Id. The conditions upon which an alien may be excluded or deported have been established by Congress. 8 U.S.C. §§1181-1227, 1251-1260. Congress has delegated

to the Attorney General and the Immigration and Naturalization Service the power to enforce the immigration laws and to regulate and supervise deportation. 8 U.S.C. §1103(a); Carlson v. Landon, 342 U.S. 524, 542-43 (1952). Changes in world politics and our internal economy affect the rights of various classes of aliens regarding admission and deportation. Carlson v. Landon, supra, at 534. Although illegal entry subjects an alien to criminal sanctions, deportation is the only sanction available for one whose presence in the country violates immigration laws. 15/

15/ If an alien has entered the country illegally, he is subject to criminal sanctions. 8 U.S.C. §1325; United States v. Doyle, 181 F.2d 479 (2nd Cir. 1950). Presence in the country in violation of immigration laws, however, is not a crime (cont. on next page)

Nothwithstanding the basic right of the federal government to deport aliens, Harisiades v. Shaughnessy, supra, at 587-88, this Court has recognized that deportation is a serious penalty that requires procedural safeguards. Bridges v. Wixon, 326 U.S. 135, 154 (1945). Similarly, Congress has recognized the need to ameliorate the impact of deportation and has established

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15/ (cont. from previous page)

and subjects one only to deportation. See Hines v. Davidowitz, supra, at 70; Abrams & Abrams, "Immigration Policy - Who Gets In and Why?", The Public Interest, Winter 1975, p. 23. See also C. Gordon & H. Rosenfeld, Immigration Law and Procedures, Vol. 2 (1977) §9-1 to 9-22 which lists civil and criminal violations but omits any mention of other punishment for one not lawfully in the country. See also Almeida-Sanchez v. United States, 413 U.S. 266, 276 (1973)(Powell, J., conc.) regarding the limited number of criminal prosecutions for illegal entry.

provisions that allow an otherwise deportable alien to remain in this country. 16/

16/ Available discretionary relief includes suspension of deportation, stay of deportation, adjustment of status, waiver of deportation and private bills. See Comment, "Alternatives to Deportation: Relief Provisions of the Immigration and Naturalization Act", 8 U.S.D. Law Rev. 323, 333-339 (1975). This Court in Elkins v. Moreno, 435 U.S. 647, 667 (1978), while noting that adjustment of status is a matter of grace and not right, cited the Board of Immigration Appeals: "Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc. will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion. [cites omitted] Id. [emphasis in original].

An alien who is in the country in violation of federal immigration law cannot be forced to leave the country until an order of deportation is obtained by the Attorney General. 17/ Thus, an undocumented alien is not necessarily a "deportable alien." 18/

17/ 8 U.S.C. §1252. Unless waived, one who is subject to deportation has a right to a formal hearing where the government has the burden of proving deportability. Navia-Duran v. Immigration and Naturalization Service, 568 F.2d 803, 811 (1st Cir. 1977); United States v. O'Rourke, 125 F. Supp. 769, 770 (W.D. Mo. 1954). As stated by this Court in Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953): "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."

18/ See In re Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) at 583 n. 103. "A 'deportable alien' is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents." United States v.

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An undocumented alien not under orders of deportation resides here at the grace of the federal government. See A.O.B. 20. As a consequence of the broad federal powers over immigration and naturalization, the federal government "enjoys rights to distinguish among aliens that are not shared by the States." Nyquist v. Mauclet, supra, at 7 n. 8. 19/

Here, Texas has created a legislative classification of undocumented children and has denied them education benefits.

18/ (cont. from previous page) Ortiz, 422 U.S. 891, 906 (1975)(Apprendix to Opinion of Burger, C.J., conc.).

19/ See also Moreno v. Toll, supra, at 658 (D. Md. 1980)(state law prohibiting non-immigrant aliens from consideration for in-state status while enrolled at state university preempted by federal law).

These children reside in Texas, are under no order of deportation, are not necessarily deportable, and are likely to remain permanently in this country. Certain Named and Unnamed Non-Citizen Children and their Parents v. Texas, supra, at 1328 (1980)(Powell, J., in chambers). Texas seeks to penalize a group of aliens who have been allowed by the federal government, to remain in the country. 20/ Moreover, the Texas statute requires each local school district to inquire into and determine each child's immigration status

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20/ Compare Graham v. Richardson, 403 U.S. 365, at 377-380 where this Court invalidated state laws which imposed on aliens auxiliary burdens in the form of denying them welfare benefits. Although the aliens in Graham were lawfully admitted and not subject to deportation, the alien children in the case at bar, though not lawfully admitted, are not necessarily deportable and are likely to remain permanently in the country.

outside the process which was set up by Congress to determine deportability. 21/ Northern Texas' use of federal immigration documents, or its reliance on determinations by the Immigration and Naturalization Service obviates this problem. As noted above, the federal government has the power to allow an otherwise deportable alien to remain in the country. Moreover, the Immigration Service's determination

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21/ School districts in Texas have adopted various policies to make such a determination. See In re Alien Children Education Litigation, supra, 501 F. Supp. 544, 553 (S.D. Tex. 1980). Compare: Doe v. Wright, 648 F.2d 432, 433 n. 2 (5th Cir. 1981) [Dallas School District]; Doe v. Plyler, 458 F. Supp. 569, 573 (E.D. Tex. 1978) aff'd, 428 F.2d 448 (5th Cir. 1980)[Tyler School District]. Such policies produce "[a] multiciplicity of tribunals and a diversity of procedures [which] are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters Local 776, 346 U.S. 485, 490-91

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certainly cannot be binding as the determination of whether an alien will be allowed to remain in the country when it is made at an advisory hearing at which the Service functions as a prosecutor. Cf. Ward v. Monroeville, 409 U.S. 57 (1972). Until found to be deportable, Texas cannot be allowed to interfere with the decisions of the federal government as to who is entitled to remain in the United States. 22/ To allow a state to deny an

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21/ (cont. from previous page)
(1953). In contrast, compare California Welfare and Institution Code §11104 which deprives aliens under federal order of deportation of state welfare benefits. See Harrington v. Obledo, 72 Cal. App. 3d 705, 713, 140 Cal. Rptr. 294, 299 (1977).

22/ Cf. Goss v. Lopez, supra, at 578, 80; Fuentes v. Shevin, 407 U.S. 67, 81 (1972) regarding the need for program procedures prior to being deprived of a protected property or liberty interest.

undocumented alien child an education prior to a determination that the child is to be deported, is to interfere with the purpose of federal immigration law. See Graham v. Richardson, supra at 378. 23/

The California statute before this Court in DeCanas had none of these consequences. That statute was directed at employers and prohibited them from hiring aliens who Congress had determined could not work in this country. DeCanas v. Bica, supra, at 363. The California statute did not

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23/ See Williams v. Williams, 328 F. Supp. 1381 (D.V.I. 1971), "To deny an alien access to our divorce courts on the sole ground that he may be in violation of an immigration law ... would attach a civil disability to some aliens without the prior benefit of the procedures designed for the purpose of enforcing the immigration laws. Id. at 1383. See also: N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978); N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) (illegal aliens entitled to vote in union representation election).

require that the State determine an alien's immigration status. The State was required only to determine whether the employer knowingly hired such an alien. Finally, whereas the Federal Fair Labor Contractor Registration Act expressly allowed such supplemental state regulation (Id. at 361-62), there is no corresponding federal authorization in the field of education. To the contrary, the federal regulations under Title I of the Elementary and Secondary Education Act of 1965 [hereinafter Title I] forbid a state from inquiring into the immigration status of either a child or his parent. In re Alien Children Education Litigation, supra, 501 F. Supp. at 586.

Thus, although education is generally a matter of local concern, a state which denies education to a class of alien children residing in this country who are not under

order of deportation, who are not necessarily deportable, and who are likely to become permanent residents, enters into a forbidden area. Doe v. Plyler, supra, 458 F. Supp. at 592. After trial in Doe v. Plyler, supra, 458 F. Supp. 569 at 581 n. 14, Judge Justice stated:

> These children, and many more like them, are likely to remain here.... The federal government has chosen, whether by act or omission, not to deport them. Many of them have younger siblings who are American citizens and who may someday be the means of legalizing the presence of the whole family. Developments of federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. Id. at 581 n. 14.

State regulation in this area thus impinges on an area which is not a peripheral federal concern, but is an area which Congress has reserved for itself.

B. THE TEXAS STATUTE STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT TO CONGRESSIONAL IMMIGRATION AND EDUCATION POLICIES.

In determining whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" Hines v. Davidowitz, supra, at 67, this Court has invalidated state legislation that "frustrates the full effectiveness of federal law", Percy v. Campbell, 402 U.S. 637, 652 (1971); "betrays a general uncompatibility with basic federal objectives", Philadelphia v. New Jersey, 437 U.S. 617, 621 n. 4 (1978), or "whose consequences sufficiently injure the objectives of the federal program" to result in "frustration to federal policy", Hisquierdo v. Hisquierdo, supra, at 483. A conflict between state and federal law may exist despite the absence of any

literal inconsistency between them. Mobil Oil v. Dubino, 492 F. Supp. 1004, 1010 (D. Conn. 1980). See Hines v. Davidowitz, supra, at 66-67. Again, this Court must consider "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

With regard to immigration, as detailed above, Congress has enacted a comprehensive scheme of regulations. Graham v. Richardson, supra, at 378. Congress has entrusted the executive branch, through the Attorney General and the Immigration and Naturalization Service, with carrying out the immigration law. As such matters relate to the conduct of foreign relations, they are "so exclusively entrusted to the political branches of government as to be largely

immune from judicial inquiry or interference." Harisiades v. Shaughnessy, supra, at 589; Haig v. Agee, __ U.S. __, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640, 652-53 (1981). The fact that Congress has created and delegated authority to the Attorney General and the Immigration and Naturalization Service to carry out its statutory program is an important factor in any preemption analysis. Tribe, American Constitutional Law, §6-26 (1978).

In looking at such authority, this Court has recognized that federal policy is made by acts of omission as well as those of commission. Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978).

Under federal immigration policy, undocumented aliens have enjoyed a form of "de facto" amnesty. In re Alien Children Education Litigation, supra, 501 F.

Supp. at 559. The federal scheme is to regulate immigration at the border and not to penalize those undocumented aliens who have established roots in this country. Doe v. Plyler, supra, 458 F. Supp. at 591. As noted by this Court, local efforts to enforce our immigration laws affects our foreign relations. Hines v. Davidowitz, supra, at 66.

Here, Texas candidly admits that this statute is designed to stem unlawful immigration since there has been a "default of the legislative and administrative branches of the federal government." AOB 20, 28. This purpose was held, below, to be an impermissible basis on well-established precedents of this Court.

Immigration policy requires a uniform national system. Hines v. Davidowitz, supra, at 73. See also The Passenger

Cases, 48 U.S. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1875). In Chy Lung v. Freeman, 92 U.S. 275 (1875) this Court invalidated a state board requirement for disembarking passengers as unconstitutional. 24/

More recently, in Nyquist v. Mauclet, supra, this Court invalidated a New York statute denying state college scholoarships to those aliens who refused to declare their intent to become citizens. 25/

24/ In Chy Lung v. Freeman, the Court stated: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs with Congress, and not to the States. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the National Government. Id. at 280. (emphasis added)

25/ In so ruling, this Court stated that the State purpose of encouraging persons to become citizens was "not permissible" as "control over immigration and naturali-

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The Texas statute has as direct an effect on immigration as the New York statute had on naturalization. 26/ "Such purposeful state regulation cannot be deemed to have a 'merely speculative or indirect impact on immigration'". DeCanas v. Bica, supra, at 356.

Second, with regard to education, the

25/ (cont. from previous page) zation is entrusted exclusively to the Federal government, and a state law has no power to interfere." Id. at 10. See also Examining Board v. Flores de Otero, supra, at 605.

26/ Certainly, if a state enacted laws which it believed would deter illegal immigration, such a policy would interfere with national policy in this area. For example, in addition to present procedures for relief from deportation and adjustment of statutes, both Presidents Carter and Reagan have proposed to Congress legislation to legitimatize the status of certain undocumented aliens. To allow states to create an underclass of undocumented aliens by denying undocumented children an education would certainly frustrate such national policies. See Doe v. Plyler, supra, 458 F. Supp. at 592 n. 30.

federal government, both through Congressional enactment of the Elementary and Secondary Education Act of 1965 and the adoption of various foreign treaties and accords, has adopted a federal educational policy designed to educate the disadvantaged. Title I provides for the distribution of federal funds to local schools to aid disadvantaged youth. 20 U.S.C. §241 (a). Nothing in the language of the statute, its regulations, or its legislative history indicates that Congress intended that a child's immigration status was to be considered. In fact, Title I specifically prohibits a state from inquiring into the immigration status of a child or his or her parent. (20 U.S.C. §2761 et seq.) In re Alien Children Education Litigation, 501 F. Supp. at 586.

This policy is consistent with the

international treaties and accords regarding education to which this country is a party. 27/ It is inconsistent for our nation to, on the one hand, pledge itself to the right of a free primary education and to the eradication of illiteracy in international forums and, on the other hand, to allow individual states to act in a manner inconsistent with our national policy. 28/

27/ Under the Protocol of Buenos Aires, the United States and other members of the Organization of American States, agreed to exert their greatest efforts to prevail compulsory free public education to all children. 21 T.I.A.S. 670, 672 (1970). Similarly, various other international instruments to which this country is a signatory espouse the right of a free primary education and the eradication of illiteracy. For a survey of these agreements, see In re Alien Children Education Litigation, supra, 501 F. Supp. at 591-94.

28/ See Oyama v. California, 332 U.S. 633, 649-50 (1948)(Black, J., conc.); Id. at 673 (Murphy, J., conc). Where state laws impair the effective exercise of the Nation's foreign policy, they are preempted. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

Federal policies in both the education and immigration areas are burdened and frustrated by Section 21.031. To uphold this statute would be to sanction each of the fifty states to enact similar legislation. Compare Edwards v. California, 314 U.S. 160, 175-176 (1941). Because these children are likely to remain in this country for years to come, it would burden not only them but this Nation as a whole. See New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 432 (1973) (Marshall, J., dis.).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgments below.

Respectfully submitted,

Peter B. Sandmann
TURNER & SANDMANN
354 Pine Street
San Francisco, CA 94104
(415) 391-8100

Joan M. Graff
Felix Velarde-Munoz
LEGAL AID SOCIETY
OF SAN FRANCISCO
693 Mission Street,
7th Floor
San Francisco, CA 94105

Robert F. Kane
P.O. Box 5909
Tahoe City, CA 95730
(916) 583-0164

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES PLYLER AND STATE OF TEXAS, ET AL.,
APPELLANTS
V.
J. AND R. DOE, ET AL., APPELLEES
IN RE ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
APPELLANTS
V.
CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN AND UNITED STATES, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

DAVID CRUMP
PROFESSOR OF LAW
LAW SCHOOL
UNIVERSITY OF HOUSTON
HOUSTON, TEXAS 77004
(713) 749-3878
ATTORNEY OF RECORD

TIMOTHY T. COOPER
BRACEWELL & PATTERSON
PENNZOIL PLACE
2900 SOUTH TOWER
HOUSTON, TEXAS 77002

OF COUNSEL:
MARK S. PULLIAM,
LATHAM & WATKINS
LOS ANGELES, CA.
SUSAN E. WAITE,
THE LEGAL FOUNDATION
OF AMERICA

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NOS. 80-1538 and 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants

V.

J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

V.

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et al,
Appellees.

BRIEF OF LEGAL FOUNDATION OF AMERICA AS AMICUS CURIAE

CONSENT OF PARTIES

All parties have consented to the filing of this Amicus Curiae brief, and copies of letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Legal Foundation of America ("LFA") is a nonprofit corporation operating as a public interest law firm. Among its objectives are the protection of a federal system in which the national and State governments each defer to the other's appropriate role and the preservation of viable public schools. LFA does not accept private fees. All litigation undertaken by it is approved by its Board of Trustees, the majority of whom are attorneys. LFA participated below as amicus curiae with leave of the Court of Appeals.

In this case, LFA urges reversal of the decision of the Fifth Circuit. As the

District Court in Alien Children pointed out, there is reason to question whether the cumulative weight of judicial intervention in public schools is beneficial. Furthermore, notwithstanding the emotional pull of the Plaintiffs' arguments, LFA believes that the statute in question represents a valid legislative attempt to deal with the intractable problem of the illegal immigrant.

STATEMENT OF THE CASE

The lower courts enjoined Texas from enforcing a statute denying State funds for the free public education of certain illegal entrants. The statute was passed comparatively recently, based upon a bill authored by a Mexican-American legislator, by a large majority of legislators concerned about increasing waves of illegal immigration. The Court of Appeals refused to find that Texas was thereby expressing even a rational interest in avoiding

encouragement of illegal entry, avoiding complicity in the federal offense of harboring, or preserving public education for bona fide residents. That Court also failed to consider the effect of the Texas Education Agency (TEA) guidelines interpreting the statute. This holding means that entrants whose presence is a violation of federal criminal law, and who have made no effort even to apply for lawful admittance, have the same right to attend free schools as citizens or legally admitted aliens.

SUMMARY OF ARGUMENT

I.

This case was decided below on a wholly erroneous legal theory. Section 21.031 does not prevent even illegal immigrants from attending school free, if they comply with Texas Education Agency guidelines and have a bona fide relationship to the State of Texas. Under the authority of Vlandis v. Kline, 412 U.S. 508 (1973),

conditioning free education on these requirements is constitutional.

II.

Section 21.031 serves important state interests. Provision of free public education to illegal entrants would place State officials in literal violation of the federal criminal law. In addition, free public education is a pull factor increasing the volume of illegal immigration. Increases in ethnic concentration from illegal immigration will impact most harshly upon Texas' poorest citizens and will frustrate the goal of educating the electorate. Illegal immigration also adversely affects bilingual education.

III.

The equal protection clause applies only to persons "within [the] jurisdiction" of a State. This phrase should not be construed in terms of mere physical presence or absence. Rather, the term "within

the jurisdiction" implies a lawful relationship of correlative obligation and authority.

IV.

Even if the equal protection clause should be considered applicable, it should not require a compelling State interest in this case. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), holds that education is not a fundamental right; it also indicates by its reasoning that "access" to education is not a fundamental right.

The statute in question does not amount to unconstitutional wealth discrimination or discrimination against children for acts of their parents.

ARGUMENT AND AUTHORITIES

I. THE STATUTE AT ISSUE MERELY CONDITIONS FREE PUBLIC EDUCATION ON REASONABLE, CONSTITUTIONAL REQUIREMENTS OF BONA FIDE RESIDENCE AND RELATION TO THE STATE.

To understand the effect of Section 21.031, one must examine the regulations promulgated by the Texas Education Agency (TEA) defining "legally admitted" aliens. Texas Education Agency, Rule 226.13.90, 5 Tex. Reg. 521 (1980). (The guidelines are reproduced as Appendix "A"). A review of those guidelines reveals that the lower courts erred in assuming that technically unlawful presence under federal law prevented free education. Many aliens who have not yet qualified for truly "legal" status under federal law are nevertheless eligible to enroll in school under state law. For example, a mere application for lawful admission is sufficient, as are more than a dozen other acts or documents. Anyone with a substantial relationship to Texas, evidenced by compliance with the TEA guidelines, is allowed to attend its schools.

Thus, the distinction is not merely

between "legal" or "illegal" presence. The regulation also reflects a distinction between those who have demonstrated a bona fide relationship to Texas and those who have not. Those who are "legally admitted" aliens, as defined by the TEA guidelines, have demonstrated, through registration with or application to the Immigration and Naturalization Service (INS), that they are not merely transients, but do intend to reside within and remain in the State of Texas.

Unquestionably, a state may limit benefits to those who are bona fide residents. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), affirmed, 410 U.S. 985 (1971). In Vlandis, the Court "fully recognize[d] that a State has a legitimate interest in protecting and preserving the quality of

its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." 412 U.S. at 452, 453. While the Court struck down a Connecticut statute creating a permanent irrebuttable presumption of non-residence for in-state tuition, it recognized that the state could make the issue turn upon bona fide residence. The instant case falls within the Vlandis reasoning.

The situation here is also like the situation in Starns v. Malkerson, supra. In Starns, the University of Minnesota promulgated a rule which provided that no student would be accorded in-state residence status for tuition purposes unless the student had been a "bona fide domiciliary" of Minnesota for at least one year. In upholding the regulation, the district court noted that the rule presumed that one was not a permanent resident if one

came to Minnesota to go to the University and had not lived in Minnesota for at least one year. The Court went on to explain:

> This presumption can be overcome if the student provides sufficient evidence to show bona fide domicilliary [sic] within the State, one element of which is proof that he has resided within the State for a period of one year. Thus, there is no arbitrary or permanent classification of the type found to constitute individious discrimination in Carrington v. Rash...[380 U.S. 89 (1965)]. We believe it is reasonable to presume that a person who has not resided within the State for a year is a nonresident student and that it is reasonable to require that to rebut this presumption the student must be a bona fide domicilliary of the State for one year. 326 F.Supp. at 240.

This Supreme Court also so held through its summary affirmance. 410 U.S. 985 (1971). Here, Texas has done nothing more than the University of Minnesota; indeed, by accepting a mere application as sufficient, it has done less.

This Court has often upheld durational residence requirements for newcomers to receive government benefits. Sosna v. Iowa, 419 U.S. 393 (1975); Vlandis v. Kline, supra; Starns v. Malkerson, supra. Cf. Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding a durational marriage requirement for certain Social Security benefits). See generally, Elkins v. Moreno, 435 U.S. 647 (1978) (discussion of the allocation of state benefits to those who are domiciliaries). While the Texas statute at issue is not a durational residence requirement, its purpose is identical: to create an objective measure of bona fide relationship to the State. As the Court stated in Weinberger v. Salfi, supra, 422 U.S. at 772:

> As in Starns v. Malkerson, 326 F.Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed. 2d 527 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a

> sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in Starns, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test. (emphasis added).

Viewed thus, the requirement of an attempt to comply with TEA guidelines by a mere application for lawful status is no more onerous than many other clearly lawful requirements to attend school. One must also, for example, demonstrate that one is at least five years of age. One must furnish evidence of immunization against a variety of diseases. None of these requirements violates the fourteenth amendment. Here, those aliens who have made an effort to apply to the INS have established a more stable and permanent relationship with the State of Texas than have those who make no such effort.

II. THE STATUTE AT ISSUE SERVES SUFFICIENTLY IMPORTANT STATE INTERESTS TO COMPLY WITH EITHER THE "ARTICULABLE RATIONAL BASIS" TEST OR THE "COMPELLING STATE INTEREST" TEST.

While the statute at issue will withstand both the strict scrutiny and rational basis tests, this Court should utilize the rational basis test if the equal protection clause is applicable at all. This test has been stated as follows:

> . . . the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 426, (1961) [emphasis added]; [citations omitted].

The statute here has many justifications.

A. The statute serves important criminal justice interests by allowing Texas to avoid complicity in the commission of a federal crime.

(1) The orders of the courts below require Texas officials to commit the crime of harboring.

Federal law prohibits the immigration or entry of a person having no authority to enter the United States. 8 U.S.C. §1325 (1964) (misdemeanor offense for first detected entry); 8 U.S.C. §1326 (1964) (felony offense for entry by a person previously deported). Much has been made in this case of the fact that some children enter without knowing and most enter with their parents. However, 8 U.S.C. §1101(a) (1964) defines illegal entry as including any "coming into the United States whether voluntary or otherwise" (emphasis added). As both District Courts stated in this case, the illegal entry statutes "do not distinguish between

children and adults," and "the undocumented minor children are, of course, legally culpable." Furthermore, harboring of a minor is as much a crime as harboring of an adult.

A State officer who knowingly furnishes shelter to an illegal entrant, adult or child, is squarely engaged in conduct prohibited by the Congressional definition of harboring. 8 U.S.C. §1324(a) (1964 & Supp. 1980). This statute makes it unlawful to facilitate either entry or continued presence by a variety of acts. "Harboring" is not limited to clandestine sheltering; it includes acts that are done openly. United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (furnishing of living quarters held harboring). The offense need not be related at all to the actual entry. It can consist in furnishing shelter long after the entrant is within the territorial jurisdiction. United

States v. Cantu, 557 F.2d 1173 (5th Cir. 1977), cert denied, 434 U.S. 1063, (1978). The statute is designed to be "broadly inclusive" rather than restrictive, and the courts of appeals have emphasized that it reaches harboring committed "in any place." United States v. Cantu, supra (harboring outside, in open air); See also, United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (acts committed outside the country are included, owing to broad interpretation of "in any place"). A "broad" construction of "in any place" presumably includes a building, such as a school building. The statute excepts employment from its terms, but that is the only exception it provides, and, in particular, there is no exemption for State government officials. Under these authorities, officers who knowingly enroll illegal entrants are squarely engaged in the offense of harboring.

(2) Texas has an important interest in avoiding even de facto participation in criminal violations.

It is unlikely that anyone would ever be sucessfully prosecuted under this theory because the approach of the Justice Department to this case ensures nonprosecution. But one need not find a prosecutable violation to argue that a State should refrain from de facto complicity in illegal activity as a matter of policy. The demoralizing effect of State participation in illegality has had predictable results here. The Alien Children District Court's own opinion states that "all know [the immigration quota] will be effectively disregarded . . . . Those who promote lawlessness by ignoring the laws are held largely blameless." In Re Alien Children Litigation, 501 F.Supp. 544, 549 (S.D. Tex. 1980). This situation is the natural consequence of government connivance in

violation of the law. It is aggravated by the knowledge of every Texas schoolchild that the circumstances the District Court criticized exist in the schools themselves, carried out by State officers on the District Court's own order.

The effect of government participation in lawbreaking was addressed early in the famous dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928). From that case and others came the exclusionary rule applied in criminal cases. The exclusionary rule reaches much government conduct that is neither intended nor morally culpable. It has devastating costs, most of which are borne by the arbitrarily defined class of future crime victims. Nevertheless, the exclusionary rule stands as a bastion to the principle that a State not only may, but must, avoid even de facto participation in illegal activity. Texas should not be

prevented from following the same principle as to harboring violations in this case.

(3) An anti-employment law would not address the problem of State complicity in crime by harboring.

The Fifth Circuit strongly suggested that it would prefer a law punishing private employers to the law in question in this case. Such a law would not address the fundamental issue addressed here. Private employment does not involve active state complicity in violation of law, but the State's offering of free school enrollment as required in this case does involve active de facto state complicity in a federal crime. Texas has a compelling interest at least as great as that underlying the exclusionary rule in avoiding de facto criminal complicity, and therefore in upholding Section 21.031, for these reasons.

(4) A federally imposed requirement that State officers commit crimes is an impermissible encroachment upon State sovereignty.

In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court held that the federal government could not force State employers to comply with wage-and-hours laws. To do so would have been an impermissible encroachment upon State sovereignty protected by the tenth amendment and the federal system. The national government, Usery says, "may not exercise power in a fashion that impairs the integrity of the States." 426 U.S. at 842-43 (emphasis added). But if these concepts are violated by a Federal wage-and-hours law, they must be even more infringed by a federal court order requiring State employees to commit criminal acts in the State's own educational system, which should teach respect for criminal laws.

B. The statute serves the important purpose of limiting State-created inducements to illegal immigration.

(1) The District Court erred in characterizing Texas' efforts to avoid encouragement of illegal immigration as impermissible.

The District Court's holding in Alien Children was that because "Measures to decrease immigration, whether legal or illegal, are the province of the federal government," a State may not "limit the inducements to" illegal immigration created by it. Aliens, supra, 501 F.Supp. at 578. There is no authority for this proposition. To the contrary, there is much authority upholding State efforts to avoid giving inducements to violation of federal policy. See De Canas v. Bica, 424 U.S. 351 (1976).

To hold that the States may not permissibly act to ensure that their own laws do not encourage the commission of federal law violations would lead to unaccountable results. For example, if a

Houston police officer observes the robbery of a federally insured bank, he should logically be permitted to apprehend the perpetrator. It would make no sense to hold that the deterrence of bank robberies by State conduct was "impermissible" merely because the federal government has acted to make them illegal. Cf. Dandridge v. Williams, 397 U.S. 471 (1970) (State does not contravene federal law by enacting decreases in aid designed in part to remove inducement to childbearing).

The argument is not denigrated by the principle that regulation of immigration is the exclusive province of the federal government. The statute in question is an enactment touching a matter of intense local concern, that of education, and is simply not a "regulation of immigration." See, DeCanas v. Bica, supra. Secondly and more importantly, it would make no sense to say that a State cannot order its local

laws so as to have beneficial effects on federal policy. For example, the City of Houston has constructed and operates an Intercontinental Airport. The federal government, however, is given the power to regulate interstate and foreign commerce (including air travel) by the Constitution, just as it is immigration. The District Court's reasoning would lead to the result that the airport would be an "impermissible" purpose for the City.

(2) The lower courts' holding that free education would provide no additional inducement to illegal entry was error.

The Alien Children District Court concluded, further, that even Texas' "impermissible" purpose would not be advanced by the legislation at issue. The Fifth Circuit implied the same by finding absence of a rational purpose. In this connection, it is conceded by all concerned that Section 21.031 will not stop

illegal immigration altogether. As the parties stipulated, a "major pull factor" for illegal immigrants is work. But work is just as obviously not the only such factor, and the courts below erred in treating it as though it were.

Motivation is made up of a calculus of all perceived benefits and perceived costs. For a given salary level, people might be willing to do some kinds of work and unwilling to do others. Fringe benefits, working conditions, and any disadvantages, danger or stigma are factors. The plight of metropolitan schools provides irrefutable proof that parents have been eager to migrate in response to the major "pull factor" of perceived quality of education. Cf. L. Graglia, Disaster by Decree: The Supreme Court's Decisions on Race and the Schools (1976).

In the case at bar, the lower courts had before them evidence that relatively

few adults who immigrate unlawfully today bring children. Those courts failed, however, to take into account the certainty that their decrees would increase the percentage who do so in the future and thus increase the level of unlawful entry. Furthermore, The Preliminary Report of the Domestic Council on Illegal Aliens (1976) identified education as a significant inducement to illegal entry. The Domestic Council described the causes as "an international push-pull." Id at 40. Employment is the main pull factor, but "social and demographic factors such as educational facilities . . . are involved." Id. Employment as a motivation "is enhanced by better opportunity for schooling and education for [aliens] and their children." Id. at 42 (emphasis added). The Domestic Council recommended the removal of secondary pull factors such as "various benefits." Id. at 110.

Experts are unable to measure precisely the inducement provided by education. But legislative judgments of the effect of an inducement or deterrent upon future human behavior must necessarily be sustained upon much less than proof of actual effects, because such proof is unattainable. Judgments of the sort have been upheld even when rewards or deterrents were severe, when they operated in sensitive Consitutional areas, and when they affected children.*

Many problems have no simple legislative "solutions." A given problem may

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* See, e.g., Danridge v. Williams, supra (subsistence to children can be reduced to prevent unquantifiable inducement to childbearing although not the only or even the "major" inducement); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) (severe increase in criminal penalty for deterrence purposes justifiable even though quantum, or even existence, of deterrence effect not provable and found only though deference to legislative judgment).

have several "causes." Often, too, it happens that a particular cause, even though the "major" cause, is more difficult to control by law than other causes. Dandridge v. Williams, supra, squarely holds that a court cannot require a legislature to adopt the balancing of competing social concerns that the court thinks "best," based on the limited sort of evidentiary predicate of a judicial proceeding.

(3) The lower Court's decision makes it unlikely that any workable plan for the control of inducements to illegal immigration can be confidently enacted.

The lower court opinions fail to describe directly any remedy against unlawful immigration that might be acceptable, but they hint at the enactment of criminal laws punishing employers as a potential measure. It is submitted, however, that those courts' own reasoning

would render unlikely the prospect that such a law could stand. The Alien Children District Court, for example, held that access to education is a fundamental right to which undocumented aliens are entitled. The right of access to employment is far more clearly a candidate to be treated as a fundamental right. Thus in Truax v. Raich, 239 U.S. 33 (1915), this Court stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure.

239 U.S. at 41. By this rationale, a law against the employment of an illegal entrant could not stand.

There would be further consitutional difficulties with a law respecting employment of illegal entrants if the reasoning of the Courts below were adopted. For example, such a law seems less likely than

this Texas law to qualify as the "least onerous alternative." It would drive resident illegal entrants underground and subject them to more of the kind of exploitation that the courts below rightly deplored. Furthermore, the plaintiffs have attacked the law here in question as ethnically motivated, and thus involving a suspect class; that argument could be more persuasively advanced in the case of an anti-employment law. Employers would likely refuse to hire legally present Hispanics in case of doubt about the legality of their status. One of the nation's most respected investigative agencies, the General Accounting Office (GAO), has concluded that an anti-employment law would be unworkable unless accompanied by a national identification card system. The GAO stated that such a card system would be "drastic" and predicted its political non-acceptance.

Houston Chronicle, December 2, 1980, Sec. 1, p. 1, col. 1.

An anti-employment law would also run afoul of the District Courts' reasoning that a law impacting upon children is constitutionally infirm. Such a law would mean that alien children residing in the United States would receive no support, since their parents could not work. It would also mean that after they had received the education ordered by the courts below, they could not be employed in the United States, on account of acts of their parents committed when they were children. This unreasonable result -- that a person would be entitled to a court-ordered free public education but an employer would commit a crime by offering him a job after he had obtained that education -- is the product of the lower courts' reasoning.

A law sanctioning employers of illegal entrants would also suffer from practical

deficiencies. To avoid penalizing employers who acted in good faith, such a law would require the imposition of a high mens rea standard (e.g., specific intent), which would make successful prosecution impractical. The law would also be widely ignored. It would create disrespect both in those sporadic instances when it would be enforced and when violations would go unpunished. In states such as California that have anti-employment laws of the sort the lower courts suggested they preferred, non-enforcement has reached nearly comical proportions. California Rural Legal Assistance (CRLA) recently sued on behalf of twelve discharged illegal aliens, winning them reinstatement and back pay of $33,000.00. CRLA, a government entity, stated that the illegality of the employment (and, for that matter, of the court-ordered reinstatement) made "no distinction." Houston Chronicle, December 17,

1980, Sec. 1, p. 9, col. 2.

The Texas law here in question is vastly different. It does not impact adversely upon citizens or lawfully admitted aliens, has produced no difficulty in enforcement, and does not require criminal sanctions for its implementation. Amicus curiae does not take the position here that a law sanctioning employers would in fact be unconstitutional, but amicus does argue that an anti-employment law, even though suggested by the lower courts, is inconsistent with those courts' own reasoning, and that it is not at all clear that the Texas law here in question is less humane or less likely to accomplish its purposes.*

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*The District Courts mentioned another possible sanction: that of reporting illegal entrants who register in school to immigration authorities. However, the exercise of a fundamental right associated with the first amendment cannot be deterred by State intrusions into associational privacy. A mass of cases, beginning with

Judge Reavley of the Fifth Circuit, in his concurring opinion in Boe v. Wright, 648 F.2d 432, 439 (5th Cir. 1981), agrees that it is not illogical to enact Section 21.031 rather than an anti-employment law:

> I suggest that the Texas Legislature could have concluded that it was more important to eliminate the incentive to illegal immigration in the form of the state and locally funded bounty of free public education, as opposed to the incentive of employment, which is for the most part in the private sector, since the policy of affording free public education to illegal aliens would be contrary to and in conflict with national education policy as established by Congress. Can it be denied that free education is an incentive to move across the Rio Grande?

The Alien Children District Court's reasoning, however, is not only based upon

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(Con't)
NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958), so holds. If the District Court's reasoning is accepted, "turning in" those who exercise this fundamental right would be unconstitutional. The conflict between this result and the federal immigration authority is obvious -- and irrational.

this proposed "solution" (an anti-employment law); instead, it is based on the assumption that there is likely in the future to be an official amnesty of undocumented aliens. Aliens, supra, 501 F.Supp. at 558, 559. Such reasoning must result in the inevitability of amnesty, the encouragement of illegal entry in the present, and the need for a further amnesty, two or three years after the first one, to absolve those who have been encouraged by it. The District Court alternatively viewed the situation as one of "de facto" amnesty, because many aliens have eluded efforts to apprehend and deport them. However, the government in fact deports thousands of illegal entrants annually. Furthermore, the District Court's reasoning would impliedly grant amnesty as to dozens of kinds of violations as to which the ratio of enforcement actions to actual infractions is much smaller (e.g., gambling

or possession of various contraband).* The error in the District Court's reasoning is that of viewing the illegal presence as "due to" the "inaction" of the government. The illegal presence is rather due to the affirmative act of those illegally present, and it should not be rewarded by extensions of rights simply because the government's effort is overwhelmed by those who have eluded it.

(4) The Texas Law is consistent with immigration policies regarding refugees.

Federal law authorizes 270,000 ordinary immigrants per year, in addition to

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*Cf. e.g., International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945) (upholding jurisdiction of defendant outside territory on ground that "privileges" of conducting business give rise to reciprocal "obligation" to respond to suit); Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339 (1940) (reciprocal relationship of lawful domicile is sufficient for jurisdiction without regard to presence, and "the authority of a state over one of its citizens is not terminated by the mere fact of his absence").

50,000 refugees. (For 1981, the refugee number has been increased to 217,000, of whom 168,000 will be from Indochina alone.) Over and above these numbers, an estimated 763,000 Cubans and Haitans were admitted in 1980. Commentary, Feb. 1981, at 55. "Asylum" remains another, separate category, for which there is no numerical limit. This lawful immigration is part of a great tradition. The United States has always held out a hand to the tired and the persecuted, and it is still doing so today.

However, Cubans are placed in armed camps surrounded by barbed wire. Haitians are "interdicted" in leaky boats and deported unless they can produce evidence that they are politically persecuted. To the embarrassment of the United States, Canada has asked that immigrants from El Salvador be deported to it rather than to the fear of death at home. In short,

criminally illegal immigration by those whose need is not as great is elbowing out the ability of this nation to absorb genuine refugees, including politically persecuted peoples. Further incentives to illegal immigrants would simply punish those who need asylum the most. Texas has an interest in ensuring that its laws do not frustrate the policy of the United States, and that purpose supports section 21.031.

C. The Statute at issue serves important interests in preserving the Texas Public School system.

(1) The State has an interest in preserving the schools of Texas, especially for those who are most dependent on those schools.

The patterns of concentration of illegal aliens in selection of housing are certain to increase the dilution of educational services for certain groups in border and urban Texas. The border school

districts, many of which have low tax bases, will strain to properly house the additional students. The urban districts will have problems accomodating the illegal alien students with respect to housing, programming and scheduling. These problems, however, will not be confined to the illegal alien student. Rather, those presently attending school will feel these problems in the form of overcrowding and dilution of the quality of education offered.

The impact will not be uniform. The people harmed by the lower courts' judgment will not be the wealthy, they will not be those who can afford to go to private schools, and they will not be those for whom the advantages of America have always been available. The impact will be on the poor, on the disadvanted, and on Mexican-American students who are citizens or legally admitted aliens. Protection and

preservation of the State's resources which are designated to provide those who most rely on public education for the chance to improve their lives is at the heart of the State's interest in free public education. It would be difficult to articulate or imagine a more compelling state interest.

(2) Texas has an interest in educating its electorate to perpetuate the democracy.

In a democracy, one of the most important functions of education is to perpetuate the democracy through an informed electorate. As Judge Reavley concluded, "Texas' interest in educating the electorate is clearly frustrated in this case." Boe v. Wright, supra, 648 F.2d at 437. The concurrence of Chief Judge Clark and Judge Reavley in Boe indicates that had Doe v. Plyler, 628 F.2d 448 (5th Cir. 1981), originally been decided by their panel of the Fifth Circuit,

the opposite result would have been reached. Doe v. Plyler, supra, does not address the need for an educated electorate. It fails to recognize that this need would not be served by its suggestion of an anti-employment law.

As Judge Reavley stated, the Texas legislature:

> could reasonably have concluded that it should not dilute its limited resources [for educating the electorate] by providing free public education to illegal aliens who can never--absent some form of amnesty--become citizens, exercise the franchise, or serve in the armed forces of the United States.

648 F.2d at 436. Furthermore, the legislature could have concluded that it was undesirable for the electorate to become segregated on de facto wealth grounds, as it would be when the "dilution" caused financially able parents to choose private schools. The State's interest is made even more poignant by TEA regulations, which mean that the illegal immigrants for

whom the electorate was thus sacrificed in Doe v. Plyler, supra, are those who have not bothered even to apply for the right to stay.

(3) The holding below failed to account for probable future events, including the fact that illegal immigration comes in unpredictable waves and the probability of adverse parental reaction to loss of autonomy.

One major error in the lower courts' analysis, it is submitted, is their failure to take account of the future. A child two years of age in Texas today will be out of the public education system in twenty years. The lower courts did not assess the cumulative effect of federal decisions over this period. The rate of illegal immigration is not steady; it is rising rapidly, and history indicates that it comes in unpredictable waves. There is no reason to believe that judicial extension of social benefits and outright

prediction of amnesty will not provoke new and more significant such waves five or ten years from now. These orders, cast in the concrete of a constitutional holding, would prevent legislative response to such a situation.

Without deference to legislative judgment about such matters, parents' views of the increasing regulation of public schools by decisions such as these, together with a declining tax base per pupil, may, by the device of the self-fulfilling prophecy, undermine public education altogether in border and urban Texas. Justice Powell expressed these ideas in Columbus Board of Education v. Penick, 443 U.S. 449(1980) and in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1980) (dissenting opinion), as follows:

> The orders affirmed today typify intrusions on local and professional authorities that affect adversely the quality of education. . . . This wholesale substitution of judicial

legislation for the judgments of elected officials and professional educators . . . constitutes a serious interference with the private decisions of parents as to how their children will be educated. . . .

These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the . . . purpose of the court's order. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence.

. . . It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems. 99 S.Ct. at 2990.

(4) The District Court's decision will impede bilingual education in Texas.

It is conceded by all concerned that there is a shortage of bilingual teachers in Texas and elsewhere. There are many reasons for the shortage. In fact, there are critical and chronic shortages not

only in bilingual teachers but in science and mathematics teachers, and for that matter in teachers generally in some areas. These events coincide with a decision ordering Texas to quadruple the number of grades in which bilingual education is provided -- a decree, by one of the same district judges involved here, that has been estimated to require an additional 20,000 nonexistent bilingual teachers. United States v. Texas, 506 F.Supp. 405 (E.D. Tex. 1981).

Illegal entrant children, as the record shows, cost nearly half again as much as the average Texas pupil to educate, but that is not the extent of the difficulty. Making present resources stretch farther can only mean that more bilingual teachers will perceive the task demanded of them as unreasonable.

D. Texas' fiscal restraint and sound budget should not be a basis for interpreting the

Constitution to impose duties upon the State that would otherwise not be imposed.

The lower courts found that the school districts of Texas, and the State, have sufficient moneys available to solve these problems in some unspecified manner. However, every State in the Union can supply funds in response to a court order by not using them on some other government function. There is no evidence, furthermore, that these are problems that can be solved by throwing dollars at them.

There is particularly great danger in the Alien Children District Court's reasoning that because Texas has a fiscally sound budget, and "can come up with the money," its surplus should go to this cause. Certainly, a constitutionally protected right would not be (and should not be) denied because the money is not in the treasury. For instance, a State would not succeed in claiming that it did not

have the money to provide counsel for indigents in criminal cases.

But even that is not the point. All government services cost money. There is today, for example, litigation concerning whether Texas should undertake enormous additional expenditures for its prison system. Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980) (Justice, J.), stayed in part, ____ F.2d ____ (5th Cir. 1981). Plaintiffs in that litigation have the ability to point to the same fiscally sound budget. Which cause should receive the money? If both District Courts reason by referring to the same surplus funds, should Texas interplead the funds? If it did, could a district court allocate funds to other severely needed services (for instance, mosquito control, police salaries or outpatient mental health care, all of which are seriously inadequate in Houston today)? These choices are not a judicial

function. The Alien Children District Court's reasoning, which penalizes Texas for sound finances and depends upon a surplus that is a small part of a large budget and produced artificially by accounting methods, should be rejected.

III. THE LOWER COURTS ERRED IN HOLDING THE EQUAL PROTECTION CLAUSE APPLICABLE TO ILLEGAL ENTRANTS.

A. The word "jurisdiction" in the equal protection clause means reciprocal obligation and authority. A construction that reduced it to a "physical territoriality" concept would lead to absurd results.

The fourteenth amendment extends the right of equal protection by a State to every person "within its jurisdiction." A strict "physical presence" or "territoriality" approach to this language would lead to the anomalous conclusion that a citizen temporarily residing in a foreign jurisdiction could not claim equal protection. Payments made under social programs could be arbitrarily stopped and he could

be denied the right to vote. This nonsensical result could be avoided by recognizing that the difference between a foreign-residing United States citizen and a foreign national with no right to enter the country is not that of physical presence or absence, but rather that of a lawful relationship to the United States creating mutual obligations.

There are judicially recognized instances in which persons within the territory of the United States are not granted the status of persons lawfully present. For example, such rights are not extended to an alien who is paroled into the United States pursuant to 8 U.S.C. § 212(d)(5) (1964) pending a deportation hearing (a process roughly similar to bail in criminal cases). Thus in Leng May Ma v. Barber, 357 U.S. 185 (1957), the petitioner had been detained for alleged illegal entry and was paroled. After she

was determined to have entered the country illegally, the petitioner claimed the immigration status of a person "within the United States." The Supreme Court rejected the contention, holding squarely that mere "physical presence" did not mean that an alien was "within the United States" in the meaning of immigration law. See also, e.g., Kaplan v. Tod, 267 U.S. 228 (1925) (paroled alien was not "dwelling in the United States" for purposes of naturalization and had not "entered," nor was she "found within," the United States for statute-of-limitations purposes). It is contradictory to hold that aliens released into the United States temporarily but lawfully are not "within the United States," but that the undocumented aliens in this case, who are not lawfully entitled to remain even temporarily, are "within the jurisdiction."

But this contradiction is only the

beginning of the results that would follow. Every right that has been held to heightened scrutiny would be granted to illegal entrants absent compelling contrary interests. Thus the plaintiffs would become entitled to maternity leave, Cleveland Board of Education v. La Fleur, 414 U.S. 632, 640 (1974); to unemployment compensation, Turner v. Department of Employment Security of Utah, 423 U.S 44, 46 (1975); to keep and bear arms, see, L. Tribe, American Constitutional Law 570 (1978); to the right of privacy granted by the penumbra discerned in Griswold v. Connecticut, 381 U.S 479, 519, (1965); to employment, Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); to enter the public lands, Twining v. New Jersey, 211 U.S. 78, 97 (1908); to the arguable right to an affordable higher education, Vlandis v. Kline, supra, 412 U.S. at 459 (White, J., concurring); to the arguable right to food

stamps, United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring); and to a variety of other rights. Although not entitled to a green card, plaintiffs would be entitled to a driver's license, Bell v. Burson, 402 U.S. 535, 539 (1971). And there would be no constitutional means of preventing illegal entrants from traveling freely in interstate commerce, Edwards v. California, 314 U.S. 160 (1941). In fact, an extension of equal protection would mean that not just fundamental rights, but all rights, would be required to be extended as well -- absent rational basis to the contrary.

For these reasons, it is submitted that the phrase "within its jurisdiction" should not be construed to mean "physically within its territory." "Jurisdiction" means something more intangible in a legal context than physical location. It means

authority and correlative obligation. It is submitted that to look to the phrase "within its jurisdiction" as meaning "with respect to whom it has obligation and authority founded on legal relationship" is more in line with usage in law* and with a sensible interpretation of the sweep of the equal protection clause.

B. Due Process decisions are made under a different standard of application from equal protection. Thus undocumented aliens are not without rights; they have the more flexible rights of the due process clause.

The construction urged here would not mean that unlawful aliens would be without rights. They would have the protection of the due process clause, which is worded so as to cover "any person." That clause prohibits invidious discrimination as well as unfair procedure, but its sweep is more flexible than that of the equal protection clause. Mathews v. Diaz, 426 U.S. 67 (1976) (under due process clause, federal

government may condition benefits to aliens on close ties with the United States, as evidenced by five year's residence).

The due process clause ensures procedural fairness, primarily. For example, due process applies to the determination whether a suspected undocumented alien is, or is not, unlawfully present. Equal protection, however, serves an allocative function, rather than a procedural one. It guides government decisions dividing resources and other entitlements among people. The difference in function of the two clauses justifies, and indeed requires, a difference in treatment.

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STRICT SCRUTINY OF THE TEXAS STATUTE AT ISSUE AND DOES NOT INVALIDATE THE STATUTE.

Amicus curiae placed the argument concerning compelling interests supporting the statute first in this brief so that

arguments concerning reasons for the statute could be clear. It is submitted that, if the equal protection clause is applicable, normal analysis rather than heightened scrutiny is the appropriate standard, and that the purposes of the statute are rational.

A. Access to free education for undocumented aliens is not a fundamental right.

The District Courts acknowledged that San Antonio Independent School District v. Rodriguez, supra, bars a holding that education is a fundamental right. The District Courts, however, distinguished "access" to education and held that the question whether such access was a fundamental right was "reserved" in Rodriguez. The reasoning of Rodriguez is contrary to the District Courts' holding. The Alien Children District Court, for example, adopted the following definition of a fundamental right: "a right is fundamental

when it is preservative of or substantially related to other basic civil and political rights which are guaranteed by the Constitution." Aliens, supra, 501 F.Supp. at 558. The District Court cited Harper v. Virginia Board of Elections, 383 U.S.663 (1966), in support of this formulation. However, the Harper formulation was rejected in Rodriguez, and fundamental rights were limited to those actually guaranteed by the Constitution.

The language of the Rodriguez majority makes the point thus:

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing the equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. . . . [or] the right to travel. Rather, the answer lies in assessing whether the right to education is explicitly or implicitly guaranteed by the Constitution."

411 U.S. at 34 (emphasis added). The

Court went on to say, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected". 411 U.S. at 35.

Furthermore, the District Courts' holding is contrary to other Supreme Court authority following Rodriguez. In Ambach v. Norwick, 441 U.S. 68 (1979), the Supreme Court stated that after Rodriguez, "access to education is not guaranteed by the Constitution." 99 S.Ct. at 1594-95 and n.7 (emphasis added). This square statement that access to education is no more a fundamental right than equality of education forecloses the District Courts' holding.

Even if the District Courts are considered correct in having viewed the issue as one of first impression, it is submitted that access to education should

not be held a fundamental right. The District Court reasoned that such access was a fundamental right because of its potential for harm if denied and its necessity for the exercise of first amendment rights. But the right of access to medical care, nutrition, subsistence and housing are, by this standard, even more clearly "fundamental." The significance of this line of argument, indeed, was accepted by the Rodriguez court:

> "Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams, supra and Lindsey v. Normet, supra.

411 U.S. at 37. This reasoning applies with greater force when "access" to educa-

tion is the issue than when "equality" of education is the issue, because a person can exercise first amendment rights without education, but he cannot do so at all without subsistence.

The District Courts' reasoning is subject to the further difficulty that the right to vote is denied to aliens (an issue not raised by Rodriguez). Consequently, this right is irrelevant to the case. As to the right to "participate in the political process," even nonresident aliens present in the United States on a temporary sojourn have that right. For that matter, they have the right when they remain in their home nations. If education is a fundamental right of all those who have a right to participate in the political process in the United States, the class of people so entitled includes the entire world.

B. The District Courts erred in holding that Section 21.031 discriminates on the basis of wealth.

The District Courts cited the following footnote from Rodriguez in holding that Section 21.031 creates unconstitutional wealth discrimination.

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people . . . That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. 411 U.S. at 25, n. 60.

The District Court in the Alien Children case then concluded, "That set of circumstances is created by this case." Aliens, supra, 501 F.Supp. at 570.

Contrary to the District Courts' holding, it is respectfully submitted that the "set of circumstances" hypothesized by Rodriguez is not created by this case. The State has not made education available "only to those able to pay a tuition."

Nor has it "clearly defined a class of poor people." Instead, it makes a free education available to all citizens and all "legally admitted" aliens (as defined by Texas Education Agency guidelines), regardless of wealth.

C. The District Courts erred in holding that the Texas statute amounted to unconstitutional discrimination against children for acts of their parents.

The District Courts held that Section 21.031 unconstitutionally "penalizes" children for acts committed by their parents. The District Courts observed that the plaintiffs "are, of course, legally culpable" and subject to deportation, but reasoned that they cannot be subjected to any additional "burdens or penalties" because of this legal culpability. Such reasoning is inconsistent with any meaningful notion of legal culpability.

Furthermore, Lalli v. Lalli, 439 U.S. 259 (1979), indicates that a statute that

impinges upon a child because of the acts of his or her parents is subject only to the normal equal protection test of rational relationship. Parents have (and should have) far more authority to affect the welfare of their children than the State, and since they do, it would be inappropriate to require the State to come forward with a compelling state interest to justify every difference in welfare of children traceable to their parents' conduct.

The District Courts cited such decisions as Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1967), in support of their decisions. Weber dealt with a law denying statutory death benefits to illegitimate children. The Court in Weber was clearly correct in holding that the legislature could not rationally have found that a person would be deterred from intercourse outside wedlock because of noninheritance

by a potential illegitimate child. Here, on the other hand, the legislature was well within the realm of reason in concluding that the substantial interests at issue would be advanced by the balance of competing social concerns at which it arrived.

There is a further reason why the line of cases represented by Weber is inapplicable here. In Weber, as in the predecessor cases of Levy v. Louisiana, 391 U.S. 68 (1967), and Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 1515 (1968), the Court "treated as determinative the inability of both parent and child to remove the burdens imposed by the illegitimacy." L. Tribe, American Constitutional Law 1057-58 (1978). Illegal presence is not an irremediable condition. Either the parents or the children can "remove the burden" in this case. The alien children have a right (which is not

shared by the children of Texas) to attend the schools of their nation under the laws of those nations. Furthermore, if they have the sort of relationship with Texas that ought to qualify them to attend school, they can conform to Texas Education Agency guidelines, which allow even technically illegal entrants to attend without charge.

CONCLUSION

The balance of competing social concerns at which Texas has arrived is not prohibited by the equal protection clause. This court should uphold that balance.

Respectfully submitted,

David Crump
Law School
University of Houston
Houston, Texas 77004
Attorney for Amicus Curiae
Legal Foundation of America

Timothy T. Cooper
Bracewell & Patterson
2900 South Tower
Pennzoil Place
Houston, Texas 77002

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APPENDIX "A"

.010 *Free Attendance in General.*

(a) (No change.)

(b) Administrative procedure.

(1)-(2) (No change.)

(3) For purposes of this section, the term "legally admitted alien" means any student who has, or whose parent, guardian, or other person having lawful control of him or her under an order of court, has any documentation issued by the United States government showing lawful entry into and admission to resident status in the United States as permitted by federal statutes and the regulations established pursuant thereto. Such documentation of resident status may include:

(A) Form I-151—Alien registration receipt card.

(B) Form I-151—Resident alien card.

(C) Form I-94—Arrival-departure record: Parole edition.

(D) Form I-94—Arrival-departure record.

(E) Passport stamped "Processed for I-551—Temporary evidence of lawful admission for permanent residence. Valid until_____ _____. Employment authorized."

(F) Form I-181b—Letter from regional INS director stating "Processed for I-551 temporary evidence of lawful admission for permanent residence. Valid until_____. Employment authorized."

(G) Letter from INS stating application for citizenship or application for residence is on file.

(H) Letter from consul general of the United States stating petition is on file.

(I) Form I-130—Petition to classify status of alien relative for issuance of immigrant visa.

(J) Form I-171—Notice of approval of relative immigrant visa petition.

(K) Form I-210—Voluntary departure (Silver-Level letter) marked "Under docket control."

(L) Form I-140—Employment verification (when proof shows that form ...as been filed with INS).

(M) Form I-230—Application for immigrant visa and alien registration (when stamped or signed by an American consul).

(N) Form FS-510—Form used by foreign service consulate in a foreign country. Filed after I-130 or I-140.

(O) Any other document recognized by the United States government.

(4) Upon application for enrollment at any local school district, a student shall present a copy of his or her permanent student academic record reflecting any prior education in a Texas public free school as required by policy and administrative procedure 23.06.030. In the event there has been no prior education or the student applicant has no permanent student academic record, the local district shall create a permanent student academic record for such student pending his or her acceptance for enrollment.

(5) In the event a child fails to produce documentation showing either a status of citizenship or that of a legally admitted alien, then the local school district shall immediately initiate an official inquiry to the regional office of the United States Immigration and Naturalization Service requesting documentation of the applicant's status. The status of such a student shall be identified in the permanent student academic record as "pending federal confirmation." The enumeration of students who are pending federal confirmation shall remain on file with the school district subject to audit by the Texas Education Agency.

(6) These procedures are applicable to those students for whom state minimum foundation support is requested and nothing herein shall prohibit any local district from accepting any student on a basis of tuition charges or cost paid by the local district.

Issued in Austin, Texas, on February 13, 1980.

Doc. No. 801198 A. O. Bowen
Commissioner of Education

Proposed Date of Adoption: March 21, 1980
For further information, please call (512) 475-7077.

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae, The Legal Foundation of America, has been served upon all parties by placing copies of same in the United States Mail, addressed to:

Mr. Richard Arnett
Assistant Attorney General
P.O. Box 12548,
Capitol Station
Austin, Texas 78711

Mr. John Hardy
Wilson, Miller, Spivey,
Sheehan, Knowles & Hardy
200 Peoples National Bank So.
Tyler, Texas 75702

Mr. Peter A. Schey
National Center for
Immigration Rights
1550 West Eighth Street
Los Angeles, California 90017

Mr. Peter D. Roos
Mexican-American Legal Defense
and Educational Fund
145 Ninth Street
San Francisco, California 94103

on this the _____ day of _____, 1981.

_____
David Crump

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NOS. 80-1538 and 80-1934

IN THE

Supreme Court of the United States

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v.

J. AND R. DOE, AS GUARDIAN AD LITEM FOR I. DOE, ET AL.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants

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CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN
Appellees

On Appeals From The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON AS AMICUS CURIAE

MICHAEL K. SUAREZ
JOSEFINA MUNIZ RENDON
119 E. 20th Street
Houston, Texas 77008
Telephone: (713) 869-3685
Attorneys for Amicus Curiae

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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On Appeals From The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON AS AMICUS CURIAE

INTERESTS OF AMICUS CURIAE*

The Mexican American Bar Association of Houston (MABAH) is a Texas Non-Profit Corporation organized

* The letters of Appellants and Appellees, consenting to the filing of this brief amicus curiae, have been filed with the clerk.

for the purposes, among others, of protecting the legal interests of the public in general and particularly those of Mexican Americans, and providing for an improved implementation and strengthening of the administration of justice. MABAH is a professional organization composed mostly of Hispanic attorneys and judges from the Greater Houston Area. Founded in 1972, MABAH has been consulted by the State Bar of Texas, by the Texas Young Lawyers Association, and by the Houston Bar Association on issues of concern to the Houston area Hispanic community. In addition, MABAH has been instrumental in protecting the Spanish-speaking community by offering comments to the Texas Legislature which legislated to control abuse by notaries public and to improve the quality of interpreters.**

ISSUES PRESENTED

AMICUS CURIAE requested a sociologist*** to make a study on the following issues:

1. Whether there is any correlation between education and an individual's performance in the society in which he/she lives.
2. Whether it is to the advantage of Texas specifically and the United States generally to educate the undocumented children in Texas.

** The undersigned, Michael K. Suarez, extends his gratitude to the MABAH membership, to his colleagues on the Executive Board (Lupe Salinas, Ellis Barrera, Arturo Ramirez, Beatriz Q. Gonzalez, and A. Robert Hinojosa), and especially Josefina Muniz Rendon for their support in the preparation of this brief.

*** The study was conducted by Dr. Tatcho Mindiola, B.B.A., University of Houstson, 1967; M.A., Sociology, University of Houston, 1970; Ph.D., Brown University, 1977. Dr. Mindiola is a Professor of Sociology and the Director of the University of Houston's Mexican-American Studies Program.

SUMMARY OF ARGUMENT

As a result of a study conducted on behalf of the Mexican-American Bar Association of Houston (MAB AH), the following conclusions were reached:

First, there is a close correlation between a person's educational level and his or her status and performance in society. Such correlation was found to exist between education and degree of socialization, occupational attainment, income, drug abuse, alcohol abuse, adult incarceration, juvenile delinquency, mental retardation, mortality and fertility. In brief, the poorly educated experience more social problems than the better educated.

Second, it is beneficial for American society in general and for the State of Texas in particular to educate the undocumented children within its borders. A substantial number of Mexican nationals and other undocumented aliens are in this country to stay, and their education or lack thereof will not significantly affect their decision to remain in the United States. Furthermore, Mexican nationals and other immigrants have brought significant economic benefits to this country. Apart from, but in addition to, Fourteenth Amendment arguments extensively covered by appellees, fundamental fairness implies that since the United States economy benefits from undocumented workers, the United States and Texas should assume responsibility for basic services, such as education, to these people.

The study on the correlation between education and performance in society also reached the conclusion that if in fact these children are here to stay, it would be undesirable, harmful and expensive to the government to have such a large uneducated, unassimilated class living

in this country. Finally, the study concludes that the decent treatment of Mexican nationals is beneficial to United States' relations with Mexico and other countries in the Western Hemisphere. United States-Mexico relations, and Western Hemisphere relations are significantly intertwined and interdependent. The proper treatment of the children of those undocumented workers, such as not effectively excluding them from an education, is essential to our national interest in maintaining our close friendship with Mexico and the other countries in the Western Hemisphere.

ARGUMENT

I. THE POORLY EDUCATED EXPERIENCE MORE SOCIAL PROBLEMS THAN THE BETTER EDUCATED.

The information which follows concerns itself with education and its effect on life chances. The term "life chances" refers to the opportunity that a person has for the better things in life,[1] i.e., a standard of living which frees the individual from the worries of having adequate food, clothing and shelter and which gives the individual the opportunity to develop his or her emotional, psychological and intellectual potential. Education is signaled out not only because it is one of the most powerful predictors of life chances[2] but also because there is an effort to deny children of undocumented workers the opportunity for an education, thus limiting their life chances. If this effort succeeds, society can expect to experience an increase in

1. Gerth, H. H. & Mills, C. Wright (eds.), *From Max Weber: Essays in Sociology* (1958).

2. Hyman, Herbert H., Wright, Charles R., & Reed, John Shelton *The Enduring Effects of Education* (1975).

the social problems which are discussed below. The public can also expect to spend more in order to deal with the increase in those who are affected by social problems. The discussion centers on the role of the schools in the socialization process, the link between education, occupation and income, and the correlation that education has to drug abuse, alcoholism, mental retardation, the number of people in prison, welfare, mortality, fertility and juvenile delinquency.

A. Socialization

Next to the family, schools are society's principal agents of socialization.[3] In many respects schools are more important than the family as mechanisms of socialization since a student spends more time in school during the formative years than he does with his family. In addition, schools are more formal and repetitive in their transmission of the values, norms and beliefs which promote and form the basis for an orderly society.[4] It is in the schools where students learn the American ideals of competition, individualism, freedom of speech, religion and the concepts of democracy, justice, liberty, and equality. It is also in the schools where patriotism and loyalty to country are learned. Schools also teach students the verbal, mathematical and writing skills needed in order to function in modern society, thus preparing them to assume occupational roles in the economy. These institutions also play a large role in helping develop healthy psychological states of mind, such as positive feelings about their bodies, their social selves and their cognitive selves. These positive feelings are in turn related to higher academic achieve-

3. Eitzen, D. Stanley, *In Conflict and Order* 108 (1978).

4. *Id.* at 109.

ment, creativity, curiosity, and greater independence.[6] There is no other social institution which performs these vital functions. Consequently, the experiences individuals gain in school are quite invaluable.

Children who do not attend school or who drop out of school prematurely have a greater risk of having a poorly developed value system, of being functionally illiterate, and of lacking occupational skills which permit upward social mobility. Children who are poorly educated have a greater probability of developing a negative self concept and of becoming adults who lack initiative, are dependent on others and who develop withdrawal or hostile and aggressive behavior towards society.[8] In general, poorly educated people cannot adequately assume the responsibilities of adulthood.

B. Occupation

The number of years of education a person has is directly related to the kind of occupation that person can obtain. The lower the educational attainment level of a person the lower his occupational status.[7] Poorly educated people normally have occupations which are unskilled or semi-skilled in nature. The majority of these jobs, which are found in the secondary sector of the economy, are characterized by low wages, poor benefits, lower rates of unionization, underemployment, an absence of upward mobility, and high rates of employee turnover.[8]

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5. Samuels, S. C., *Enhancing Self Concept In Early Childhood* at 175 (1977).

6. *Id.* at 182.

7. Shepard, John M., *Sociology*, Ch. 12 (1981).

8. Edwards, Richard C., Reich, Michael & Gordon, David M. (eds.), *Labor Market Segmentation* (1975).

In comparison, people who are college educated hold high status occupations which provide good pay, adequate benefits and the opportunity for advancement. In 1978 approximately 53 percent of the population holding unskilled or semi-skilled jobs had between 0-8 years of education while only 12.1 percent of the population with 0-8 years education were in a high status occupation.[9] The relationship between education and occupational status is so well established that it has become a truism that poorly educated people cannot obtain good occupations.

The level of educational attainment also affects the chances for finding a job. The poorly educated classes in society always have higher rates of unemployment. In 1977, for example, 19.5 percent of the population who had completed between 0-8 years of education were unemployed. This is in comparison to only 3.2 percent of the population with four years or more of college.[10]

C. Income

Since education has a direct relationship to occupational status, then it should not be surprising that education is also directly correlated to one's income. In 1977 persons who had eight or less years of education averaged $4,902; those with a college education averaged $20,222.[11] The effects of a poor education upon income is also cumulative over time. In 1972, for example, persons with less than eight years of education earned $279,977

9. Shepard, *supra*, note 7, at 301.

10. U.S. Department of Labor, Bureau of Labor Statistics, *Educational Attainment of Workers*, Special Labor Force Report 209 (1977).

11. National Center for Education Statistics, *Digest of Education Statistics*, Table 179 (1980).

over their lifetime. Persons with a college education earned $710,569 in their lifetime.[12] In other words, over their lifetime, the poorly educated earn only one-third of the amount earned by the college educated.

The importance of income cannot be overstated. Income determines whether a person rents or buys a home as well as the quality of the housing a person can afford. It also affects how a family eats and dresses and whether medical and dental care can be obtained. In addition, income determines the quality of opportunities which can be passed on to one's children. In sum, the amount of income earned affects the total standard of living and places the poorly educated at a clear disadvantage.

D. Drug and Alcohol Abuse

The poorly educated Americans suffer from a higher incidence of drug abuse of all kinds. Addicts to heroin, barbiturates, and inhalants have on the average eight years of education.[13]

There is also a larger percentage of heavy drinkers among the uneducated, especially among the ages 21 to 39. In 1972, approximately 63 percent of males between these ages who were classified as heavy drinkers were from the lower middle and lower classes and were poorly educated.[14]

One significant aspect of drug abusers and heavy drinkers is their anti-social behavior. They are more apt

12. *Id.*

13. Einstein, Stanley, "The Addiction Dilemma: Gaps In Knowledge, Information Dissemination Service and Training," in Thomas, Charles C. (ed.), *Drugs and Youth* (1968).

14. Susman, J. (ed.), *Drug Use and Social Policy* (1972).

to have a low threshold of frustration and therefore more prone to engage in negative aggressive behavior and to exhibit feelings of hostility toward society.[15]

E. Adult Incarceration and Juvenile Delinquency

The probability of going to jail is also correlated with low levels of education. In 1978 approximately 50 percent of the inmates in local jails had less than ten years of education.[16] What is even more remarkable is that in 1980, of the inmate population at the Texas Department of Corrections, 85 percent did not complete high school, 80 percent had less than a seventh grade education, and 50 percent had less than a fifth grade education.[17]

Juvenile delinquents, i.e., adolescents who commit crimes, are also the products of a poor educational environment since most juvenile delinquents have parents who are not highly educated.[18]

F. Mental Retardation

Low levels of educational attainment are also correlated with lower rates of mental retardation. The frequency of mental retardation among the poorly educated is estimated to be between 10 and 30 percent while the frequency of mental retardation is estimated to be only three percent among the total population.[19] The higher

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15. Einstein, *supra*, note 13, at 95.

16. U.S. Department of Justice, Bureau of Justice Statistics, "Profile of Jail Inmates: Sociodemographic Finding from the 1978 Survey of Inmates of Local Jails", Table 6.9 (1980).

17. *Ruiz v. Estelle*, Civil Action No. H-78-987, Memorandum Op. at 3 (S.D. Tex. Dec. 10, 1980).

18. Profile of Jail Inmates, *supra*, note 16.

19. Wieldeman, G H. (ed.), *Personality Development and Deviation: A Textbook for Social Work* (1975).

rates of mental retardation are assumed to be a function of other characteristics associated with the uneducated, namely inadequate pre- and post-natal care, poor nutrition among mothers, a higher frequency of birth defects, m illnesses among children, and inadequate medical care in general.[20]

G. Mortality

The rate at which people die is also associated with education. It is estimated, for example, that the death rate for persons with less than an elementary education is more than six times the rate for the college educated.[21] It is also estimated that infant mortality rates are higher among the lesser educated.[22] Furthermore, certain avoidable causes of death are higher among the poorly educated, especially the infectious, parasitic and digestive diseases.[23]

H. Fertility

The poorly educated also have a larger number of children. In 1969 the number of children born per 1,000 women who had less than an elementary education was 2,396 while women who had completed some college education were bearing children at a rate of 1,279.[24] Com-

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20. *Id.*

21. Mathis, Evelyn S., "Socioeconomic Characteristics of Deceased Persons," National Center for Health Statistics, Series 22, No. 9, Table A (1969).

22. Stockwell, Edward G., Wicks, Jerry W. & Adamchak, Donald J., "Research Needed on Socioeconomics Differentials in U.S. Mortality," *Public Health Reports*, Vol. 93, at 666-72 (1978).

23. *Id.*

24. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 226, "Fertility Variations By Ethnic Origins" (1971).

paratively, the less educated women were having 1,117 more children.

In addition, in comparison to the better educated, poorly educated people tend to have their first sexual experience at an earlier age and a larger number of sex partners of the opposite sex.[25] The poorly educated also have a higher rate of illegitimate births.[26]

In summary, the poorly educated experience more social problems than the better educated. Since groups or classes tend to perpetuate themselves over time, the probability is high that the offspring of the uneducated will likewise be poorly educated. Consequently, they too will suffer from the same maladies that their parents encountered. In other words, the vicious cycle of social problems continues. This cycle, the evidence suggests, can be broken only if the children of the poorly educated are given an educational opportunity.

II. IT IS BENEFICIAL FOR THE STATE OF TEXAS TO EDUCATE THE UNDOCUMENTED CHILDREN WITHIN ITS BORDERS.

A. Undocumented alien children are generally here to stay.

The denial of an education to Mexican children in the United States can only have long term negative effects. Mexican nationals have been coming to the United States in large numbers ever since the early 1900's. Efforts to

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25. Weinberg, Martin S. & Williams, Colin J., "Sexual Embourgeoisment? Social Class and Sexual Activity: 1938-1970," *American Sociological Review*, Vol. 45, at 33-48 (1980).

26. Keser, Clyde V., Grabill, Wilson H. & Campbell, Arthur A., *Trends and Variations In Fertility In the United States* (1968).

prevent or slow down immigration from Mexico have largely been unsuccessful.

The United States Comptroller General reported to Congress that the prospects are dim for effectively enforcing the immigration laws, stating that aliens have little chance of being located and deported.[27] After listening to the evidence, the lower courts in the instant cases reached similar conclusions.[28]

The percentage of undocumented immigrants who stay permanently in the United States is small compared to those who return to their home country.[29] However, those who are most likely to stay are those who have family in this country. Once in the United States, their children are more likely to grow up here unless detected by the Immigation and Naturalization Service. The presence of a large Mexican immigrant population in the United States seems to be a certainty. Whether the children and their parents should or should not be here is not the issue before this Court. Since their residence in the United States is a fact, the more important issue is how the United States should deal with immigrant children who conceivably will grow up in the United States and will eventually become resident aliens and American citizens. As adults they will more likely become burdens to the society if they are deliberately denied an education. On the other hand, their chances of becoming productive

27. U.S. General Accounting Office, Report to the Congress by the Comptroller General of the U.S., p. ii (1980).

28. *E.g., In re Alien Children Litigation*, 501 F.Supp. 544, 558 (S.D. Tex. 1980).

29. Cornelius, Wayne A., "Mexican Migration to the United States: Causes, Consequences, and U.S. Responses," Center for International Studies, M.I.T. (1978).

members of the society are increased if they receive the necessary education.

B. Mexican nationals have provided economic benefits to the United States.

The economic contributions of the Mexican population have been enormous. Mexicans helped build and develop the railroads, the mines, and the agricultural industry.[30] Mexicans have worked longer, harder and for less pay than other workers, but they have done so with a dignity that has astounded their employers. The Congressional hearings on immigrant labor are filled with references to the value of Mexican workers and their positive characteristics.[31] Mexican workers are directly involved in producing wealth in the United States in two ways. First, they create more wealth than they receive in the form of wages,[32] and second, as consumers, they help develop the economy.[33]

The essence of the free enterprise system is maximizing profits. One of the ways this is done is by employing labor that is less expensive. This allows employers to take a larger share of wealth in the form of the profits and invest it for expansion and development of the economy. Mexican workers have traditionally been the inexpensive labor which helps set this process in motion.

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30. Galarza, Ernesto, *Merchant of Labor* (1964).

31. Hearing on Undocumented Aliens, February 24, 1978, before the Subcommittee on the Departments of State, Justice and Commerce, U.S. House of Representatives, 95th Congress, 2nd Session (1978).

32. Baran, Paul A., *The Political Economy of Growth* (1962).

33. Cornelius, *supra*, note 29.

C. It is highly undesirable to have an uneducated class.

The presence of a large undocumented immigrant population in the United States is a certainty, and the prospects for enforcing laws controlling this immigration is next to impossible. Consequently, this Court's decision on the education of these children will be an extremely crucial one.

As stated earlier, there is a significant correlation between education and degree of socialization, occupational attainment, income, drug abuse, alcohol abuse, adult incarceration, juvenile delinquency, mental retardation, mortality and fertility. Federal, state and local governments have spent large amounts of funds on programs which seek to overcome the effects of a low educational achievement.[34]

Furthermore, approximately 20 percent of the Mexican American population in the United States lives in poverty. This is in comparison to only nine percent of the white population.[35] To deny Mexican immigrant children an education can only result in increasing the number of persons of Mexican descent in all of the ills that are associated with poor educational attainment. In addition, since a large majority of the poor in the United States would be Mexicans, efforts to contain the "problems" of the poor can only lead to more racism on the part of members of America's societal mainstream, and more

34. According to U.S. Bureau of the Census, Statistical Abstract (1977), a total amount of $4.6 billion was spent by federal, state, and local governments in 1977 in operating penal institutions.

35. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 354, Persons of Spanish Origin in the United States: March 1979 (1980).

frustration and potential violence on the part of the Mexican nationals and Mexican-Americans.

On the other hand, providing Mexican immigrant children with the opportunity for an education can only benefit American society. Schooling would prepare them to assume responsible adult roles. Schools still remain the principal institutions of assimilation into the mainstream of American culture. It is in the schools where Mexican children learn English and "American" values, and in the process increase the probability that they will become productive and responsible citizens. There is no better alternative to providing children with an opportunity for an education especially when one considers the negative results that are associated with not having an adequate education.

D. Foreign policy considerations require the decent treatment of Mexican nationals in the United States.

The United States is the single largest investor in Mexico.[36] Mexicans form the largest immigrant labor force in the United States.[37] The United States is depending upon Mexico's oil reserves to ease the demand for energy while Mexico is depending upon American technology to develop its oil reserves.[38] More American citizens visit Mexico than any other country.[39] At the same

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36. "Survey of Current Business," U.S. Bureau of Economic Analysis (August, 1980).

37. Cornelius, *supra*, note 29.

38. Fagan, Richard R., "The Realities of U.S.-Mexican Relations," *Foreign Affairs*, Vol. 12, No. 2 (1977).

39. *Travel Market Yearbook, 1976/77* at 55 (1977).

time, Mexico exports more commodities to the United States than to any other country.[40] These factors are further emphasized by the fact that our country shares with Mexico a border which is 2,000 miles long.[41]

These facts illustrate the complex manner in which the relationship between Mexico and the United States is intertwined. At this historical moment the relationship remains unequal because of the vast economic differences between the two countries. Yet despite these differences, both countries are dependent upon each other for resources, commerce, technology and labor. Also, the unequal relationship is changing because of Mexico's oil reserves and its promising future. Given this, the United States should take a view towards Mexico which encompasses an understanding of how immigration from Mexico benefits her long term interests. Not only does Mexican immigration provide labor for American industries, but it also relieves pressure upon the Mexican economy and provides the Mexican government with more time to gather momentum for economic development.[42] The safety valve that immigration to the United States provides Mexico lessens the agitation for social change. Should the push for social change become too great it may ultimately threaten American investments and raise the possibility of a hostile government coming to power.

Within this context, the manner in which citizens of Mexico are treated in the United States assumes greater importance. It can serve to set the stage for the future

40. *U.S. Bureau of the Census: Statistical Abstracts of the United States* (1980).

41. Samora, Julian, *Los Mojados: The Wetback Story* (1971).

42. Fagan, *supra*, note 38.

relationship between the two countries. For the United States to desire only the fruits of Mexican labor without also assuming the responsibility for the health, education and welfare of Mexican immigrants is not only shortsighted but also harmful to the overall relations between the two countries. This is not a matter to be taken lightly.

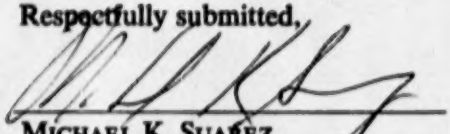
The Select Commission on Immigration devoted a section of its report to international issues regarding immigration to the United States. It recognized the high degree of interdependence in the global economy, and it urged the "expansion of bilateral consultations with other nations, especially with Mexico and other regional neighbors, to determine how migration pressures might be moderated to the *mutual benefit* of the United States and other members of the international community." Among others, it recommended that these consultations include discussions on mutual cooperation for the protection of nationals residing in each other's countries.[43]

43. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* 28-29 (1981) (emphasis added).

CONCLUSION

Wherefore, Amicus Curiae prays that this Court grant the relief requested by the Appellees by affirming the judgment of the Court of Appeals.
Dated October 28, 1981.

Respectfully submitted,



MICHAEL K. SUAREZ
JOSEFINA MUNIZ RENDON
Attorneys for Amicus Curiae

MOTION FILED
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Nos. 80-1538 and 80-1934

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants,

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J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor - Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From the United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

ROGER J. MARZULLA
MAXWELL A. MILLER
LINDA M. DAVISON
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
Telephone: 303/861-0244
Attorneys for the Amicus Curiae

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UNDOCUMENTED ALIEN CHILDREN,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Mountain States Legal Foundation respectfully moves this Court, pursuant to rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation is a nonprofit, public interest law firm. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. In addition, the Foundation is dedicated to preserving, through legal advocacy, the constitutional balance of national and state powers.

2. The issues involved in this case — whether undocumented aliens are entitled to equal protection of the laws and if so, the extent of such protection — will have a far-reaching impact on those individuals and states directly affected by illegal immigration into the United States. An examination of this impact on the American public is crucial to a well-reasoned resolution of the present controversy. As *amicus curiae*, the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and states' rights and that underscore the need for clarifying the legal rights of undocumented aliens.

3. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties, and thus may not be adequately addressed by the existing parties. Because Mountain States Legal Foundation has previously participated in cases testing equal protection issues on behalf of the public interest, it respectfully submits that it can serve a useful role as *amicus* in this case.

4. Letters indicating the consent of the parties to the Foundation's participation as *amicus curiae* will be filed under separate cover with the clerk of the Court.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted,

ROGER J. MARZULLA
MAXWELL A. MILLER
LINDA M. DAVISON
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
Telephone: 303/861-0244

Attorneys for the Amicus Curiae

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INTEREST OF THE AMICUS CURIAE

Mountain States Legal Foundation is a nonprofit, public interest law firm. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. In addition, the Foundation is dedicated to preserving, through legal advocacy,

the constitutional powers of the states, especially where the subject matter involves a traditional state function, such as education. As *amicus curiae*, the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and states' rights. These considerations underscore the need to clarify the legal rights of undocumented aliens, and the rights of the states to deal with acute local problems created by illegal immigration into the United States. Because the issues in the present case will have a significant impact on the public at large and on the development of constitutional law, they transcend the specific interests of the parties, and thus may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

All persons physically within the United States, including undocumented aliens, are entitled to due process of law to insure they are not deprived of life, liberty or property without adequate procedural safeguards. But due process rights do not give undocumented aliens the right to demand state benefits under equal protection of the laws.

This Court has accorded aliens an ascending scale of constitutional rights, depending upon the degree to which they have become assimilated into our society. Within this ascending scale of constitutional protections, only lawfully admitted resident aliens have been afforded equal protection of the laws.

An alien's right to equal protection is the result of a congressional decision to admit resident aliens to permanent residence on an equality of legal privileges with citizens. This equality includes equal protection under state laws. But such is not the case with undocumented

aliens. Because Congress has not permitted them to enter the United States, Congress has not extended to them any guarantee of equal protection under state laws. Therefore, undocumented aliens have no constitutional claim to share in state benefits.

However, if this Court decides that undocumented aliens are entitled to equal protection rights, the appropriate standard of judicial review would be the rational basis test. First, undocumented aliens are not a suspect class. Their legal disabilities are not the result of an "unalterable trait," but rather, are the result of their own decision to enter this country in violation of federal immigration laws. Thus, they have chosen to classify themselves.

Second, education is not a fundamental right. Because undocumented aliens do not have the right to work in this country, nor the right to participate in state and federal political processes, the denial of education to undocumented aliens does not interfere with the exercise of other fundamental rights.

Finally, it would be fundamentally unfair to women, to illegitimate children, to the elderly and to all other non-suspect minority groups, to apply strict scrutiny to classifications based upon illegal entry into this country. The application of strict scrutiny would also be unfair to those aliens who have complied with federal immigration laws and have made a commitment to the United States.

Under the rational basis test, section 21.031 of the Texas Education Code is rationally related to preserving the fiscal integrity of state education programs. The statute allows the state of Texas to deal rationally with the difficult task of allocating limited state benefits while its illegal resident population continues to grow.

The court of appeals correctly decided that section 21.031 is not preempted by federal law. First, Congress has not expressed any intent to preempt the field of educating undocumented aliens; second, education is a matter of local rather than federal concern; and third, by restricting undocumented aliens from receiving a state-funded education, the Texas statute frustrates no federal policy with regard to the immigration or education of undocumented aliens.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ENCOMPASS UNDOCUMENTED ALIENS.

The legal issues presented in the instant case are ones of first impression. For the first time this Court is called upon to determine whether undocumented aliens are entitled to equal protection of the laws.

The cases in which this Court has determined the constitutional rights of aliens illustrate that aliens have been afforded an ascending scale of constitutional guarantees, depending upon their lawful admission into the United States and the conditions imposed by Congress upon their entry. Within this ascending scale of constitutional protection, only lawfully admitted resident aliens have been afforded equal protection of the laws. Because undocumented aliens have entered this country in violation of federal immigration laws, they are not entitled to an equality of legal privileges with citizens and lawfully admitted resident aliens.

A. *Undocumented aliens have basic constitutional rights under the due process clause; however, equal protection rights are not coextensive with due process rights.*

Freedom from arbitrary state deprivations of life, liberty and property is guaranteed by the due process clause of the fourteenth amendment. Entitlement to share in the benefits of a state's largess, however, is encompassed by the equal protection clause. U.S. Const. amend. XIV. These two constitutional provisions are fundamentally different and not coextensive. Therefore, even though undocumented aliens have basic constitutional rights to procedural due process, they are not automatically entitled to the constitutional guarantee of equal protection in claiming benefits generated by taxpayer dollars.

For example, in *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court held that a state welfare regulation which placed a maximum limit on family welfare benefits did not violate the petitioner's rights to equal protection. In upholding the regulation, this Court distinguished the procedural protections afforded at the termination of benefits from the right of an individual to demand such benefits from the state:

> The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg v. Kelly*, 397 U.S. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

397 U.S. at 487.

Similarly, in *Maher v. Roe*, 432 U.S. 464 (1977), this Court held that while a state could not deprive a woman

of her fundamental right to have an abortion, it need not provide indigent women with funds to pay for abortions. *See also, Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J. concurring).

These cases illustrate that due process rights are not synonymous with equal protection rights. Indeed, this Court has specifically recognized that "the two protections are not always coextensive." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

The same concepts apply to undocumented aliens. First, it is undisputed that undocumented aliens are entitled to due process of law. *Matthews v. Diaz*, 426 U.S. 67 (1976); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) In *Matthews*, this Court emphasized, "[e]ven one whose presence in this country is unlawful . . . is entitled to that protection." *Id.* at 77. The implication of this statement is that undocumented aliens are not necessarily entitled to other constitutional protections.

Second, not all classes of aliens are afforded the same degree of constitutional protection. *Compare Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (nonresident aliens are not entitled to constitutional due process) *with Matthews v. Diaz, supra,* (all persons physically present within the United States are entitled to procedural due process) *and Graham v. Richardson*, 403 U.S. 365, 371 (1971) (lawfully admitted resident aliens are entitled to equal protection). As Justice Jackson stated in *Johnson v. Eisentrager:*

> *The alien*, to whom the United States has been traditionally hospitable, *has been accorded a generous and ascending scale of rights as he increases his identity with our society.* Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they

> become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. (Emphasis added.)

339 U.S. 763, 770 (1950).

The most basic and fundamental of all constitutional rights is the right to due process of law. It is only fitting that this constitutional guarantee should be extended to all persons, including those whose presence in this country is unlawful, to insure they are not deprived of life, liberty or property without adequate procedural safeguards. But due process rights do not give undocumented aliens the right to demand state benefits under equal protection of the laws. As noted above, aliens have been afforded an ascending scale of constitutional rights, depending upon the degree to which they have become assimilated into our society. Within this ascending scale of constitutional protection, undocumented aliens are entitled to due process of law, but equal protection is a constitutional guarantee extended only to those aliens lawfully admitted by Congress.

B. *The equal protection clause does not encompass undocumented aliens because Congress has not extended to them the right to enter the United States on an equality of legal privileges with citizens and lawfully admitted aliens.*

While due process rights are based upon physical presence in the United States, equal protection rights are based upon an alien's legal status in this country. It is congressional permission to enter the United States that implies equal protection of the laws. Conversely, there is no implied right to equal protection in the absence of lawful entry.

Undocumented aliens have some of the same status characteristics as both nonresident aliens and lawfully ad-

mitted resident aliens. Undocumented aliens, like lawfully admitted aliens, are physically within the territory of the United States. They are like nonresident aliens, however, because Congress has not granted them permission to enter the United States. It is logical, therefore, to determine the rights of undocumented aliens by analyzing the rights of these other two groups.

A nonresident alien has no constitutional right to enter the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Indeed, nonresident aliens have no constitutional rights at all; they are entitled only to the proper functioning of the immigration laws as established by Congress. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

In contrast, lawfully admitted aliens are entitled to constitutional protection. Congressional permission to enter the United States endows an individual with certain constitutional rights. For example, in *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950), this Court stated, "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."

In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court held that California could not prohibit lawfully admitted aliens from fishing in coastal waters while permitting all others to do so. There it was said:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all person *lawfully* in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws. (Emphasis added.)

334 U. S. at 420. *See also, Truax v. Raich*, 239 U.S. 33, 39 (1915).

This reasoning was specifically relied upon in *Graham v. Richardson*, 403 U.S. 365, 374, 378 (1971), where this Court held that legal alienage is a suspect classification for purposes of the equal protection clause:

> [A]liens *lawfully* within this country have a right to enter and abide in any State in the Union on an "equality of legal privileges with all citizens under non-discriminatory laws." (Emphasis added.)

Id. at 378, quoting *Takahashi*.

The reasoning articulated by this Court in *Takahashi* and relied upon in *Graham* makes clear that lawful admission is the basis of an alien's right to equal protection. In addition to lawful entry, however, the conditions of entry imposed by Congress also determine equal protection rights.

For example, resident aliens have a constitutional right to work in the United States because their lawful admission to permanent residence confers this privilege. *Truax v. Raich*, 239 U.S. 33, 43 (1915). Certainly Congress would not have admitted these aliens to permanent residency without the corollary right to survive in our society.

On the other hand, nonimmigrant aliens admitted to temporary residence do not have equal opportunity of employment because Congress has not granted them this privilege. *Pilapil v. Immigration & Naturalization Service*, 424 F. 2d 6 (10th Cir. 1970). In *Pilapil*, the petitioner, lawfully admitted to the United States on a student visa and subject to deportation, argued that he had a constitutional right to work. In rejecting this argument the court of appeals stated:

> Before this limited status was granted to [the student], he had no rights under the Constitution,

> laws or government of the United States . . . . The limited status given him as an alien student had some specific conditions attached . . . . He acquired only the limited status established by the conditions.
>
> . . . .
>
> Therefore, no rights under the Constitution of United States relative to equal opportunity of employment are involved.

Id. at 11.

The conditions and terms of entry into the United States are solely within the discretion of Congress. *Fiallo v. Bell*, 430 U.S. 787, 794 (1977). Moreover, this Court has specifically recognized that Congress, in its discretion, may restrict the equal protection rights of aliens:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country. Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence. (Emphasis in original.)

Matthews v. Diaz, 426 U.S. 67, 80 (1976).

Because Congress has the power to grant or restrict the constitutional rights of aliens, the states may not impose restrictions on aliens that conflict with congressional intent. In *Graham v. Richardson, supra*, this Court stated with regard to indigent aliens:

> Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges . . . are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws . . . .

403 U.S. at 378. *See also, Takahashi, supra*, 334 U.S. at 419. In contrast, the states may impose restrictions on aliens that are harmonious with federal restrictions. *De Canas v. Bica*, 424 U.S. 351 (1976) (upholding a California statute prohibiting the knowing employment of illegal aliens).

Thus, an alien's right to equal protection is the product of a federal decision to admit resident aliens to permanent residence *without restriction*. The states may not restrict the equal protection rights of lawfully admitted aliens because Congress has extended to them full equal protection of state laws.

But such is not the case with undocumented aliens. Because Congress has not permitted them to enter this country, Congress has not extended to them any guarantee of equal protection under state laws. As a result, undocumented aliens do not share an equality of legal privileges with citizens and lawfully admited resident aliens, and do not have a constitutional claim to share in state benefits. Therefore, the states, by weighing policy considerations, may restrict undocumented aliens from sharing state benefits, so long as the restriction does not interfere with federal power over immigration and foreign affairs. As *amicus* will demonstrate in section IV of this brief, the challenged Texas statute does not interfere with federal power over immigration.

II. IF THIS COURT DETERMINES THAT UNDOCUMENTED ALIENS ARE ENTITLED TO EQUAL PROTECTION RIGHTS, THE APPROPRIATE STANDARD OF JUDICIAL REVIEW IN THE PRESENT CASE WOULD BE THE RATIONAL BASIS TEST.

The court of appeals below did not decide directly whether section 21.031 of the Texas Education Code should be reviewed under a rational basis standard or some more stringent test of judicial scrutiny. This Court, however, has determined that strict judicial scrutiny is applicable only where state action involves a fundamental right or a suspect classification. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967). Absent these strict scrutiny categories, a statute need only be supported by "some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40.

The present case involves neither a fundamental right nor a suspect classification. Moreover, it would be fundamentally unfair to citizens and lawfully admitted aliens to apply strict judicial scrutiny to classifications based upon illegal immigration status. For these reasons, the appropriate standard of judicial review in the present case is the rational basis test.

A. *The rational basis standard is appropriate because undocumented alien status is not a suspect classification under the equal protection clause.*

This Court has determined that "certain classifications based on unalterable traits . . . are inherently suspect and must be justified by some 'overriding statutory purpose.'" *Lindsey v. Normet*, 405 U.S. 56, 73 (1972). Three distinct classes have been recognized as suspect for purposes of equal protection: (1) race, *Loving v. Virginia*, 388 U.S. 1

(1967); (2) national origin, *Korematsu v. United States*, 323 U.S. 214 (1944); and (3) legal alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). These three classes not only represent "discreet and insular" minorities, *id.* at 372, but each represents an unalterable trait.

In *Nyquist v. Mauclet*, 432 U.S. 1 (1977), Justice Powell recognized that a status which an individual is powerless to change is an important factor in determining a suspect classification:

> [A]liens residing in this country necessarily are subject to a period of time during which they *must* bear this status of "alien." Nothing except time can remove him from his identified status as an "alien" and from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control. (Emphasis in original.)

Id. at 18-19 (Powell, J. dissenting).

Justice Powell's reasoning was adopted by this Court in two later cases. In *Foley v. Connelie*, 435 U.S. 291, 294, n.3 (1978), the Court noted that a lawfully admitted alien's status is beyond his or her control since Congress has imposed a five-year residency requirement before an alien may attain citizenship. And in *Ambach v. Norwick*, 441 U.S. 68 (1979), this Court upheld a New York statute barring those aliens who refused to seek naturalization from teaching in the public schools. In applying a rational basis standard, this Court found determinative that the aliens had "chosen to classify themselves" by refusing to apply for United States citizenship. *Id.* at 80.

Thus, race, nationality and the legal status of alienage are traits which an individual is powerless to control. How-

ever, when legal disabilities are the result of an individual's own affirmative actions, a classification based upon those disabilities is not suspect.

Such is the case with undocumented aliens. Their legal disabilities are not the result of an unalterable trait but are the result of their own decision to enter this country in violation of federal immigration laws. Neither Congress nor the states have required them to bear the status of undocumented aliens; rather, they have "chosen to classify themselves." *Id.* Because undocumented alienage is not a status beyond the individual's control, it lacks one of the indicia this Court has always used in determining suspect status. Therefore, undocumented alienage is not a classification requiring strict judicial scrutiny.

Finally, this Court's holding in *De Canas v. Bica*, 424 U.S. 351 (1976), offers further support for applying a rational basis standard in the present case. In *De Canas* the exclusive federal power to regulate immigration did not preempt a California statute prohibiting the knowing employment of illegal aliens. Although equal protection of illegal aliens was not in issue, the Court in *De Canas* applied equal protection terminology to find that the protection of California's lawfully resident labor force and economy were "vital state interests" and that the legislation was "tailored to combat effectively the perceived evils." 424 U.S. at 357. Implicit in this holding is that both the statute and the classification based on illegal entry were rational. While it might be argued that California's interest in protecting is economy was compelling rather than merely rational, this Court has held in several cases that a state's concern for fiscal integrity, while legitimate, is not a compelling state interest for equal protection analysis. *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Accordingly, the holding in *De Canas* implies that classifications based upon ille-

gal immigration status are not suspect and therefore, the appropriate standard for reviewing such classifications is a rational basis test.

B. *The rational basis standard is appropriate because undocumented aliens do not have a fundamental right to a state-funded education.*

This Court has already decided that education is not a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Consequently, not even citizens of the United States have a constitutional right to receive a state-funded education. Clearly then, undocumented aliens, whose presence in this country is unlawful, are not guaranteed an education by our Constitution.

Nevertheless, appellees argued in the district court and court of appeals below that because *Rodriguez* dealt only with relative differences in education spending levels, this Court left open the question of whether a denial of access to education might involve a fundamental right. *Amcius* strongly disagrees that this question remains unresolved after *Rodriguez*. In *Ambach v. Norwick*, 441 U.S. 68 (1979), this Court stated in dictum that "access to education is not guaranteed by the Constitution." *Id.* at 77, n. 7. However, even if this question remains unanswered after *Rodriguez*, the instant case does not offer the opportunity to resolve this issue at the present time.

Although education is not itself a fundamental right, this Court recognized in *Rodriguez* that education is related to the effective exercise of first amendment rights and the intelligent utilization of the right to vote. *Id.* Further, this Court noted that appellees' arguments in *Rodriguez* might have had more immediacy had education been absolutely denied because a total denial could interfere with an individual's "full participation in the political process."

Id. at 37. Thus, a denial of education conceivably could involve a deprivation of a fundamental right, in some cases, if it seriously interfered with an individual's exercise of other fundamental rights, particularly his or her ability to participate in the political process.

But undocumented aliens do not have a right to participate in state or federal governmental processes. Unlike lawfully admitted aliens, they do not have the opportunity to become citizens and ultimately enjoy the right to vote. The denial of education to undocumented aliens therefore does not interfere with the exercise of political rights.

Furthermore, although education is related to the effective exercise of other fundamental rights, this Court recognized in Rodriguez that food, clothing and shelter are perhaps even more important than education to full participation in the political process. *Id.* at 37. If this Court were to find that access to education is fundamental, then logically, access to food, clothing and shelter would also be fundamentally necessary to the effective exercise of constitutional rights. A denial by a state of welfare benefits would then become a denial of a fundamental right, thus undermining this Court's decision in *Dandridge v. Williams*, 397 U.S. 471 (1970). Similarly, an eviction proceeding enforced through a state court would represent a denial of the fundamental right to housing, thus undermining *Lindsey v. Normet*, 405 U.S. 56 (1972). An additional question this Court would face is identifying how much education, food, clothing or shelter is constitutionally required to insure the meaningful exercise of other constitutional rights. As this Court stated in *Rodriguez*, "the logical limitations on appellees' nexus theory are difficult to perceive." 411 U.S. at 37.

Finally, a decision that undocumented aliens are entitled to a state-funded education would be inconsistent with *De Canas v. Bica*, 424 U.S. 351 (1976), where this

Court upheld, under the preemption doctrine, a state statute prohibiting the employment of undocumented aliens. Clearly, *De Canas* stands for the proposition that undocumented aliens do not have the right to work in this country. Consequently, the right to provide one's family with food, clothing and shelter are not fundamental interests as far as undocumented adults are concerned, and yet respondents urge this Court to find that undocumented children should have a fundamental right to a state-funded education. Because undocumented aliens cannot legally work in this country, nor can they vote or otherwise participate in state or federal political processes, there are no overriding policy considerations to justify a finding that undocumented aliens have a fundamental interest in a state-funded education.

C. *It would be fundamentally unfair to citizens and lawfully admitted aliens to apply strict scrutiny to classifications based upon illegal entry into the United States.*

In section II A of this brief, *amicus* demonstrated that all suspect classifications involve an unalterable trait. The converse, however, is not true: all unalterable traits are not suspect. Thus, this Court has not applied strict judicial scrutiny to classifications based upon sex, *Craig v. Boren*, 429 U.S. 190 (1976); illegitimacy, *Matthews v. Lucas*, 427 U.S. 495 (1976); or age, *Vance v. Bradley*, 440 U.S. 93 (1979). In *Matthews* this Court specifically noted that women in the United States have been historically subjected to severe and pervasive discrimination, 427 U.S. at 506, and yet women have not been accorded suspect status for equal protection purposes. *Amicus* therefore submits that it would be fundamentally unfair to all non-suspect minority groups to apply strict judicial scrutiny to classifications based upon illegal entry into this country. Surely the framers of the Constitution could not have intended

that persons who have entered the United States illegally, and whose presence here remains unlawful, should receive greater constitutional protection than minority citizens of the United States.

Moreover, it would be fundamentally unfair to resident aliens, lawfully admitted by Congress, to apply strict scrutiny in the present case. Lawfully admitted aliens have entered this country in compliance with federal immigration laws and their constitutional rights stem from a congressional decision which extends to them an equality of legal privileges with citizens. If this Court were to hold that undocumented aliens are entitled to the same degree of constitutional protection as documented aliens, not only would federal immigration laws become meaningless, but congressional power to extend or restrict the legal privileges of aliens would be seriously undermined.

For these reasons, *amicus* urges this Court, in considering the equal protection merits of the present case, to apply a rational basis standard of judicial review.

III. SECTION 21.031 OF THE TEXAS EDUCATION CODE IS RATIONALLY RELATED TO PROTECTING THE FISCAL INTEGRITY OF THE STATE'S EDUCATION PROGRAMS.

Because federal immigration laws are not adequately enforced, many border states, including Texas, are faced with the difficult task of allocating limited state benefits while their illegal resident population continues to grow. Under these circumstances, the states should be afforded the opportunity to weigh policy considerations and formulate rational solutions to their fiscal dilemmas.

Under the rational basis test, state regulations do not violate the equal protection clause so long as they bear *some* rational relationship to the state's objectives. The method chosen by the state to solve its social or economic problems need not be the best solution or even the wisest solution to the problem. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Moreover, this Court has recognized that it is not within a court's province to substitute its judgment for that of the state legislature. *Id.*

The court of appeals below found that section 21.031 was not rationally related to any state objective. While purporting to recognize the principles stated above, the court reached its decision by substituting its own judgment for that of the Texas legislature. For example, the court noted that if Texas were truly interested in discouraging immigration, it would have enacted the measure *most* likely to achieve this goal — a statute prohibiting employers from employing illegal aliens. 628 F.2d at 461. The court of appeals was clearly erroneous in even considering its own alternatives to Texas' problems.

Section 21.031 serves the main objective of protecting the fiscal integrity of Texas education programs. Just as California has a legitimate interest in protecting its law-

fully resident labor force and economy (*De Canas v. Bica*, 424 U.S. 351 (1976)), Texas has a legitimate interest in protecting the educational quality of its programs by preventing the drain on local education funds caused by an increase in illegal immigration. The Texas statute, by denying a state-funded education to undocumented alien children, rationally serves this purpose.

An additional objective advanced by the state in the Fifth Circuit is the discouragement of illegal immigration. Surely section 21.031 is rationally related to this objective since it removes one incentive for undocumented aliens to immigrate. Further, the Texas statute discourages undocumented aliens from immigrating with their entire families and setting up long-term residence in this country.

Although illegal immigration is a national problem, it is particularly acute in the border states. The state of Texas, by enacting section 21.031, has attempted to rationally deal with this aggravated local problem while providing its lawfully resident population an adequate educational system. Because the Texas statute is rationally related to state objectives, it does not violate the equal protection clause.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THAT SECTION 21.031 OF THE TEXAS EDUCATION CODE IS NOT PREEMPTED BY THE IMMIGRATION AND NATIONALITY ACT OR BY TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT.

In *De Canas v. Bica*, 424 U.S. 351, 355 (1976), this Court distinguished between regulation of immigration, which is an exclusive federal power, and regulation of aliens, an area in which the states possess legislative power. Immigration was narrowly defined in *De Canas* as a "determination of who should or should not be admitted into this country, and the conditions under which a legal entrant may remain." *Id.* at 355. Moreover, this Court recognized that a state regulation of aliens which has a "purely speculative and indirect impact on immigration" is not constitutionally impermissible. *Id.* at 355-56. A state regulation of aliens is invalid under the supremacy clause, U.S. Const. art. VI § 2, only if: (1) Congress has expressed its intent to preempt the field in question, *id.* at 356; (2) the subject matter of the regulation is exclusively federal, *id.*; or (3) the state regulation frustrates congressional purposes, *id.* at 363. None of these conditions is present in the instant case.

A. *Congress, by enacting the Immigration and Nationality Act and the Elementary and Secondary Education Act, did not intend to preempt the states from regulating the education of undocumented aliens.*

As a preliminary premise, this Court stated in *De Canas* that unless the "clear and manifest purpose of Congress" to preempt state legislation could be demonstrated explicitly in a federal statute or in its legislative history, such intention would not be presumed by this Court. *Id.*

at 357-58. Therefore, the challenged Texas statute is valid unless Congress has clearly expressed its intent to preempt the field of educating undocumented aliens.

With regard to the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1503 (1976), neither the language of the INA nor its legislative history indicates any preemptive congressional intent. The statute is completely silent as to the right of the states to restrict undocumented aliens from receiving a state-funded education. Furthermore, as this Court held in *De Canas*, the "central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Id.* at 359. The INA is not concerned with the employment of undocumented aliens, *id.*, nor is it concerned with the education of undocumented aliens.

The second federal statute involved in the present case is Title I of the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 2701-2854 (Supp. II 1978). Like the INA, Title I of the ESEA evidences no clear congressional intent to preempt the field of educating undocumented aliens. As the court of appeals noted, this program is simply a funding measure for a comprehensive aid-to-state education program which provides specific funds to assist the states in meeting the special educational needs of children. 628 F.2d at 453. The program is completely voluntary with regard to state participation; the act establishes eligibility criteria for the states to follow in order to qualify for federal funds and, if these criteria are not met, federal funds are withheld.

Neither the language of the ESEA nor its legislative history indicates a clear congressional mandate that educationally disadvantaged children shall include undocumented aliens. The statute is silent on this issue. But even if Title I was meant to include undocumented children,

the statute does not manifest a congressional intent to preempt the field of education with regard to the specific programs covered in the act.

Thus, Congress, by enacting the Immigration and Nationality Act and the Elementary and Secondary Education Act did not intend to preempt the field of educating undocumented aliens. Therefore, section 21.031 of the Texas Education Code is a valid exercise of state regulatory power.

B. *Texas may regulate the education of undocumented aliens because education is a local rather than federal concern.*

The second of the *De Canas* criteria for preemption mandates that state regulation of exclusively federal subject matters are invalid. However, the subject matter of the Texas statute, education, is one that has traditionally been a subject of state and local concern under state police powers. As this Court stated in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), "education is perhaps the most important function of state and local governments." And in *Milliken v. Bradley*, 418 U.S. 717 (1974), this issue was unmistakably put to rest:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.

Id. at 741-42. *See also, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Unquestionably, education is historically, traditionally and primarily, an area of local rather than national concern. Section 21.031 therefore meets the second requirement under the *De Canas* preemption test.

C. *Section 21.031 of the Texas Education Code does not frustrate federal objectives in the areas of immigration and education.*

The third preemption test enunciated in *De Canas* requires the invalidation of state regulations that frustrate the purposes and objectives of a federal statutory scheme. However, *De Canas* clearly indicates that the federal objectives in enacting the Immigration and Nationality Act were aimed at controlling the "terms and conditions of admission to the country and the subsequent treatment of aliens *lawfully* in the country." 424 U.S. at 359. (Emphasis added.) The state's main objective in enacting section 21.031 was to protect the fiscal integrity of its educational funding. 628 F.2d at 459. Because of these divergent objectives, it is difficult to find any possible conflict between the state and federal schemes.

Although the Texas statute is not aimed at controlling immigration, it does have the effect of removing another incentive for undocumented aliens to immigrate by denying them a state-funded education. In this respect, section 21.031 may have an indirect impact on immigration. As this Court recognized in *De Canas*, however, an indirect impact on immigration does not render a state law constitutionally invalid as long as it is consistent with federal objectives. 424 U.S. at 355-56. The Texas statute, by removing one incentive to enter this country illegally, is actually furthering rather than frustrating the policies of the INA. Moreover, the Texas statute relies on an immigration status that is determined by federal law and does not require an independent state determination of immigration status. Consequently, there is no possibility of a state definition of "undocumented alien" or "lawfully admitted alien" that could conflict with the federal definitions of these terms. Section 21.031 is therefore entirely consistent with fed-

eral policies concerning the immigration of undocumented aliens.

Similarly, no federal objective with regard to the education of undocumented aliens is frustrated by section 21.031. Indeed, there is no clear indication that Congress has any policy on this issue. Title I of the Elementary and Secondary Education Act certainly evidences no such policy. Furthermore, because Congress has made state participation in the ESEA voluntary, it is unreasonable to argue that a state decision not to participate would frustrate congressional objectives.

Amicus has demonstrated that section 21.031 meets all the requirements established by this Court in *De Canas*. First, Congress has not expressed any intent to preempt the field of educating undocumented aliens; second, education is a matter of local rather than federal concern; and third, by restricting undocumented aliens from receiving a state-funded education, section 21.031 frustrates no federal policy with regard to the immigration or education of undocumented aliens. Section 21.031 of the Texas Education Code is therefore a valid exercise of state legislative power.

CONCLUSION

For all of the above reasons, Mountain States Legal Foundation urges this Court to reverse the Fifth Circuit's decision that section 21.031 violates the equal protection clause, and uphold the Fifth Circuit's decision that section 21.031 is not preempted by federal law.

Respectfully submitted,

ROGER J. MARZULLA

MAXWELL A. MILLER

LINDA M. DAVISON

MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

Attorneys for the Amicus Curiae

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Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER AND STATE OF TEXAS, *et al.*,
Appellants,

v.

J. AND R. DOE, as guardian ad litem for I. DOE, *et al.*,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, SUPPORTING APPELLEES

Of Counsel
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

ROBERT J. KENNEY, JR.
Attorney of Record
SARA-ANN DETERMAN
DAVID M. GISCHE
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4707
Attorneys for *Amici Curiae*

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BRIEF AMICI CURIAE OF THE
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THE LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, SUPPORTING APPELLEES

INTERESTS OF THE AMICI

The National Education Association and the League of United Latin American Citizens file this brief as amici curiae supporting affirmance of the decisions below. Letters by all parties consenting to the filing of this brief have been filed with the Court.

The National Education Association is a non-profit corporation founded in 1857 and chartered by an Act of Congress in

1906. It is an independent, voluntary organization of some 1.7 million educators, including professional teachers, supervisors, and administrators. One of its principal purposes is to promote the education of all children in the United States. The Association has long been committed to the principle that access to basic education is essential to the interests of society and its individual members.

The League of United Latin American Citizens was founded in Texas in 1929 to promote the political, social, and economic rights of Hispanic people in the United States. The League has been extensively involved in the promotion of educational opportunities for Hispanics in Texas and the Southwest, and has been especially

active in the litigation of Hispanic desegregation cases and the development of bilingual educational programs for Hispanics. The League views the Texas statute involved in these cases as part of a long history of educational discrimination against Hispanics in Texas.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1975, Section 21.031 of the Texas Education Code, V.T.C.A. Education Code § 21.031 (1976 Supp.) gave the right to tuition-free basic education to all children actually residing within a local Texas school district. Section 21.031 was amended in 1975 to limit tuition-free education to "citizens of the United States or legally admitted aliens."

At least some local Texas school districts, under color of Section 21.031, have chosen to exclude all undocumented alien children from access to the public schools. Moreover, in those school districts in which undocumented alien children have been charged tuition, the district courts below found that indigent undocumented alien children could not afford the required tuition payments and were hence effectively excluded from Texas public schools. Thus, Section 21.031 effects an absolute denial of basic education to undocumented alien children residing in the State of Texas, while providing free public education to all others.

Amici contend that any state law which totally deprives resident children of access to basic education so fundamentally

damages the children's opportunity to function in society that it must be subjected to strict scrutiny under the equal protection clause. The history of the Fourteenth Amendment confirms that access to education was one of the most basic rights of freedmen which the equal protection clause was designed to protect. The debates in Congress during the adoption of the Fourteenth Amendment reflect a consensus that educational opportunity was essential to the full exercise of constitutional and other rights by former slaves and that access to basic education was a fundamental right protected by the equal protection clause. This consensus was confirmed less than four years after enactment of the Fourteenth Amendment, when Congress conditioned the readmission to

representation in Congress of several states, including Texas, on the express promise that their state constitutions never be amended to deny equal access to the common-schools and school privileges established by their existing constitutions. The constitutionality of these Congressional readmission statutes was expressly predicated on the view that under the Fourteenth Amendment access to basic education was a fundamental element of a republican form of government.

Amici also contend that the present cases reflect precisely the form of discrimination which the Fourteenth Amendment was designed to eliminate -- discrimination which results in the perpetuation of a permanent subclass of

benighted individuals within the borders of a state neglectful of their interests. The long history of discrimination against Hispanics in Texas closely parallels the history of discrimination against slaves and post-Civil War freedmen which motivated Congress to amend the Constitution. Although the legal status of undocumented alien children is different in some respects from that of post-Civil War freedmen, the debates on the Fourteenth Amendment reflect Congress' recognition that the fundamental importance of educational opportunity did not arise solely from the legal and political status of those being discriminated against.

Because Texas has not advanced a compelling state interest in excluding undocumented alien children from its public

schools, Section 21.031 cannot withstand the strict scrutiny which the equal protection clause requires. The statute should therefore be declared constitutionally invalid.

ARGUMENT

I. ACCESS TO BASIC EDUCATION IS ONE OF THE FUNDAMENTAL INTERESTS PROTECTED BY THE EQUAL PROTECTION CLAUSE.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 25 n.60, 36 (1973), this Court suggested, without deciding the point, that strict judicial scrutiny might be warranted where a state which otherwise provided free public education totally excluded some of its residents from its public schools.

The issue left open in Rodriguez is presented by these cases. 1/

As the Court in Rodriguez recognized, the absolute denial of basic education may unconstitutionally impede the meaningful exercise of the First Amendment freedom to impart and receive information and the effective utilization of the right to vote. Id. at 35-36. The relationship between education and the proper functioning of a republican form of government is one which was frequently expressed by the original framers of the Constitution. The existence of the relationship was made explicit

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1/ The Supreme Court has not addressed this issue since Rodriguez, although in a case involving the right to teach in public schools, the Court, citing Rodriguez, stated that a fundamental interest was not at stake. Ambach v. Norwick, 441 U.S. 68, 77, n.7 (1979).

eighty years later in the debates of the 39th Congress involving the Fourteenth Amendment and two related statutes, the extension of the Freedmen's Bureau and the Civil Rights Act of 1866. These debates reveal Congress' understanding that freedmen could not truly achieve equal status unless they were provided with meaningful educational opportunities. Congress implemented this understanding by making access to basic education one of the fundamental guarantees of the equal protection clause.

At the time the federal Constitution was originally adopted, the tradition of universal public education provided at government expense had only begun to take hold in this country. The Constitution itself does not make explicit reference to

education, and only seven of the original thirteen states included provisions in their first state constitutions for the education of state residents. Knight & Hall, Readings in American Educational History (1951) at 113. However, the fact that the framers of the Constitution had not yet settled on the means of providing education does not suggest that they were in disagreement as to the crucial role of education in preserving the nascent republican government which they had created. To the contrary, as stated by the historian Page Smith, "[t]hose Founding Fathers who discussed education (and most of them did) were agreed on one basic tenet: a republican form of government could not

survive without an educated citizenry." 2/

This basic tenet was expressed by George Washington in his Farewell Address:

> Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened. 3/

John Adams also believed that education was essential to a republican form of government:

> Education is more indispensable, and must be more general, under a free government than any other. In a monarchy, the few who are likely to govern must have some education, but the common people must be kept in ignorance; in an aristocracy, the nobles should be

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2/ Smith, The Shaping of America, Vol. III (1980), at 353.

3/ Farewell Address (Sept. 17, 1796) reprinted in 13 The Writings of George Washington 309 (P. Ford ed. 1892).

> educated, but here it is even more necessary that the common people should be ignorant; but in a free government knowledge must be general, and ought to be universal. 4/

It is in the writings of Thomas Jefferson, an ardent proponent of public education, that the most thorough exposition of the relation between education and government may be found. Specifically, Jefferson viewed education as a necessary corollary of the right to an equal vote and of the right freely to transmit and receive information:

> If a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be. The functions of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor

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4/ 6 The Life and Works of John Adams 198 (Charles Francis Adams ed. 1851).

can they be safe with them without information. 5/

Jefferson also believed that the population must be educated in order for a free press to fulfill its role under the Constitution. "When the press is free," Jefferson wrote, "and every man able to read, all is safe." 6/ James Madison expressed these same views: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or, perhaps both." 7/

Thus, the framers of the original Constitution believed that education was as

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5/ Letter from Thomas Jefferson to Col. Yancey (January. 6, 1816) reprinted in 6 The Writings of Thomas Jefferson 517 (H. Washington ed. 1857).

6/ Perkinson, Two Hundred Years of American Educational Thought 44 (1976).

7/ 9 The Writings of James Madison 104 (G. Hunt ed. 1910).

much a necessity for the kind of government and society they envisioned as it was a private good to those who received its benefits. The maintenance of a division of powers within a unified government and the guarantee of personal liberty within a democracy was believed to hinge, at least in part, on the existence of an educated populace.

A. The History of the Fourteenth Amendment Reveals that Basic Education Was One of the Fundamental Interests of Freedmen Which the Equal Protection Clause Was Designed To Protect.

The first session of the 39th Congress convened on December 4, 1865, six months after the close of the Civil War. During this first session, which lasted through July 28, 1866, the 39th Congress debated

three measures which dealt directly with Reconstruction policy and the emergence of former slaves into freedom: the extension of the Freedmen's Bureau (S.60, 39th Cong., 1st Sess., Cong. Globe at 943), 8/ debated from January 12 through February 20, 1866; the Civil Rights Act of 1866 (Act of April 9, 1866, c.31, 14 Stat. 27), debated from January 29 through April 9, 1866; and the Fourteenth Amendment itself, debated from May 8 through June 13, 1866. These enactments must be considered together, not only because of their chronological proximity but also because Congress itself considered each to be related to the others. See Bickel, The Original

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8/ Unless otherwise stated, all references to the Congressional Globe in this section refer to the 39th Congress, 1st Session.

Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 7-8 (1955).

By the time of the Civil War all of the Northern states and many Southern states had constitutional and legislative provisions providing a common-school education for all children at public expense. See Cubberly, Public Education in the United States (1934) at 163. However, the education of blacks in the Southern states was still virtually non-existent. See Brown v. Board of Education, 347 U.S. 483, 489-90 (1954). In fact, prior to the Civil War most Southern states had enacted legislation prohibiting the education of all blacks, both free and slave. 9/

9/ For a contemporary review of these laws, see Cong. Globe, 36th Cong., 1st Sess., at 1685 (April 12, 1860) (remarks of Senator Wilson).

Approximately ninety-five percent of all blacks in the South at that time were illiterate. Bond, The Education of the Negro in the American Social Order (1934) at 21.

Between the adjournment of the 38th Congress in March 1865 and the opening of the 39th Congress, several Southern states, acting through provisional governments set up by President Johnson, enacted "Black Codes" designed to restrict the freedoms of former slaves. These Black Codes were perceived by Congress as continuing the South's historic practice of forbidding the education of blacks. See, e.g., Cong. Globe at 589-90.

The history of the first session of the 39th Congress, which led to the passage of the Fourteenth Amendment, demonstrates that one of the overriding concerns of the

framers of that amendment was access to educational opportunity by freedmen, which had been denied by the Black Codes of several Southern states. Professor Alexander Bickel has described this concern as follows,

> [T]he first approach made by the 39th Congress toward dealing with racial discrimination turned on the "civil rights" formula. The Senate Moderates . . ., who sponsored this formula, assigned a limited and well-defined meaning to it. In their view it covered the right to contract, sue, give evidence in court, and inherit, hold, and dispose of real and personal property; also a right to equal protection in the literal sense of benefiting equally from laws for the security of person and property . . . . Similarly, the Moderates often argued that one of the imperative needs of the time was to educate, to "elevate," to "Christianize" the Negro; indeed, this was almost universally-held doctrine, from which even Conservatives . . . and Democrats . . . did not dissent. Hence one may surmise that the

> Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. (emphasis added).

Bickel, supra, at 56. 10/ This guarantee of "equal benefits from state educational systems" was thus intended to be a significant part of the more general guarantee of the equal protection clause.

As soon as the 39th Congress was convened, Senator Wilson of Massachusetts

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10/ Professor Bickel's view that the framers of the Fourteenth Amendment believed they were guaranteeing equal access to state educational systems is fully consonant with his opinion, expressed in the same article, that "there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools. . ." (emphasis added). Id.

introduced a bill designed to nullify the provisions of the Black Codes. As stated by Senator Wilson, his bill was necessary so that the Negro freedman

> can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; . . . (emphasis added).

Cong. Globe at 111. Although the bill ultimately was withdrawn, in its place the Senate began immediate consideration of a bill to extend the Freedmen's Bureau and of the Civil Rights Bill.

The purpose of the extension of the Freedmen's Bureau was to restrain any attempt by the Southern states to enforce the Black Codes. Prior to consideration of

this bill, the Senate had requested and received a report from the President on the status of the Southern states, including the status of education for the freedman. Cong. Globe at 30, 78-80. This report discussed the opposition of Southern whites to black education and recommended that education of the Negro be an integral part of the educational system of the states. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) at 2, 25-27.

One of the provisions of the Freedmen's Bureau bill authorized the Bureau to provide suitable buildings for schools. Cong. Globe at 210. In support of this provision, Senator Trumbull of Illinois, after noting that the Bureau was already providing schooling for seventy thousand black children, stated that "our laws are

to be enacted with a view to educate, improve, enlighten, and Christianize the negro." Cong. Globe at 322. This theme was further emphasized by Representative Donnelly of Minnesota:

> The one great error of our country has been that education was not from the very first made a matter of the State, and as essential to the citizen as liberty itself. Education means the intelligent exercise of liberty, and surely without this liberty is a calamity, since it means simply the unlimited right to err. Who can doubt that if a man is to govern himself he should have the means to know what is best for himself, what is injurious to himself, what agencies work against him and what for him? And the avenue to all this is simply education. Suffrage without education is an edged tool in the hands of a child - dangerous to others and destructive to himself.

Cong. Globe at 586.

After passage of the Freedmen's Bureau Act, the Senate turned immediately to

consideration of the Civil Rights Bill (S.61). The debates on this bill are especially relevant to the history and meaning of the Fourteenth Amendment, because Section 1 of the Fourteenth Amendment (which includes the equal protection clause) was designed to place into the Constitution the rights which the Civil Rights Act of 1866 enumerated. See, e.g., Cong. Globe at 2459 (remarks of Representative Stevens); 2467 (remarks of Representative Boyer).

In his opening remarks in support of the Civil Rights Bill, Senator Trumbull made clear that the bill was designed to eliminate the discriminations of the Black Codes. Id. Senator Trumbull, in listing the primary evils of these Black Codes, referred to the provisions of the precursor

Slave Codes which made it "a highly penal offense for any person, white or colored, to teach slaves . . ." Id. Similarly, Representative Raymond of New York, a moderate Republican, stated his support for extending to Negroes the "rights and privileges" of citizens, which he meant to include "all those rights that tend to elevate [the Negro] and educate him for still higher reaches in the process of elevation." Id. at 1266.

Section 1 of the Civil Rights Bill as originally proposed provided that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State...on account of race, color, or previous condition of slavery..." Cong. Globe at 474. That section then enumerated certain rights available to all "inhabitants

of every race and color", including the right to the "full and equal benefit of all laws and proceedings for the security of person and property . . .". Id.

The full and equal benefit of all laws and proceedings included equal access to basic education. Referring to that clause, Representative Delano of Ohio, a moderate Republican, stated on the floor of the House,

> [W]e once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void . . . .

Cong. Globe at App. 158. Although the bill as finally enacted eliminated the broad provision protecting general "civil rights

or immunities", the clause providing for the full and equal benefit of all laws was retained.

Because many of the supporters of the goals of the Civil Rights Act doubted that Congress could constitutionally enforce civil rights in the states, passage of the Civil Rights Act led immediately to renewed consideration of a proposed constitutional amendment. 11/ On April 30, 1866, the Joint Committee on Reconstruction placed before both Houses of Congress a committee draft of a proposed constitutional amendment. This draft contained the equal protection language as finally enacted.

11/ For example, Representative Bingham of Ohio, one of the most influential members of the 39th Congress and one of the draftsmen of the Fourteenth Amendment, voted against the Civil Rights Act on constitutional grounds, although he was fully supportive of its goals. Cong. Globe at 1290-93.

The subsequent debates on the proposed Fourteenth Amendment focused primarily on issues other than Section 1, which contained the due process and equal protection provisions. See Bickel, supra, at 47-48, 54. To the extent that Section 1 was discussed, it was urged in order to place the protections of the Civil Rights Act into the Constitution, see, e.g., Cong. Globe at 2459, 2465, and to authorize federal action to prevent the injustices of the Black Codes. 12/

12/ For example, Senator Howard of Michigan, who introduced the draft to the Senate, stated that Section 1

> abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.

Cong. Globe at 2766.

Although the debate on Section 1 was limited, two particular statements are worthy of note. Senator Howe of Wisconsin, addressing the contention that the amendment invaded state rights, argued that no state had the right to deny the protection of equal laws. In enumerating instances of unequal laws, Senator Howe referred to "a statute enacted by the Legislature of Florida for the education of her colored people," stating,

> They [the Florida Legislature] make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men.

Cong. Globe at App. 219. Describing this Florida statute as touching upon "one of the great interests not only of this

colored population but of the State itself," Senator Howe concluded by asking rhetorically whether there could be any hesitation in putting into the Constitution "a positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed." Id. Although several Senators in response questioned the wisdom of requiring integrated schools, not one expressed doubt that the "crime" identified by Senator Howe would be forbidden by the equal protection clause.

On the last day of Senate debate, Senator Henderson of Missouri described recent actions of the South which in his view necessitated passage of the constitutional amendment:

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the Negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave.

Cong. Globe at 3034. The Fourteenth Amendment passed the Senate on June 8, 1866 by a vote of 33 to 11, having already passed the House on May 10, 1866 by a vote of 128 to 37.

B. Congressional Actions Immediately Following Adoption of the Fourteenth Amendment Confirm that Access to Basic Education Was a Fundamental Interest Protected by the Equal Protection Clause.

The Reconstruction Act of March 2, 1867 (14 Stat. 428) required all Confederate states (except Tennessee) to reapply

for readmission and representation in Congress after fulfillment of certain conditions. One of these conditions was that the people of these states adopt state constitutions that would be "in conformity with the Constitution of the United States in all respects . . ." Id., § 5. The action and debates of Congress in 1870 during consideration of the application for readmission of Virginia, Mississippi, and Texas provide strong corroboration of the conclusion that access to basic education was one of the fundamental interests protected by the equal protection clause.

The bill to readmit Texas to representation in Congress (Act of Mar. 30, 1870, c. 39, 16 Stat. 80, 81) contained a provision prohibiting Texas from amending its constitution's school provisions. At

the time this bill was enacted, Article IX of the Texas Constitution stated in relevant part,

> Section 1. It shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State between the ages of six and eighteen years.
>
> * * *
>
> Section 4. The legislature shall establish a uniform system of public free schools throughout the State.
>
> Section 5. The legislature . . . shall pass such laws as will require the attendance on [sic] the public free schools of the State of all the scholastic population thereof. . .

The debates in Congress on the clause forbidding Texas to amend its constitution's school provisions were quite limited. The purpose of the clause, however, was

made very clear in the earlier debates concerning identical provisions in the acts of Congress readmitting Virginia and Mississippi.

The bill to re-admit the State of Virginia was reported to the House by the Committee on Reconstruction on January 11, 1870. H.R. 783, Cong. Globe, 41st Cong., 2d Sess. at 362. 13/ As part of this bill, Congress declared Virginia entitled to representation in Congress upon certain "fundamental conditions," including the following proviso:

> That the constitution of said State shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to

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13/ Unless otherwise stated, all references to the Congressional Globe in this section refer to the 41st Congress, 2d Session.

> vote or hold office in said state who are entitled to vote or hold office by said constitution. . .,or to prevent any person on account of race, color, or previous condition of servitude from serving as a juror or participating equally in the school fund or school privileges provided for in said constitution . . . (emphasis added).

Id.

The purpose of the provision forbidding any amendment of the state constitution in regard to equal access to schools was explained by Representative Paine. Although the Virginia constitution provided funding for a common-school system accessible to blacks as well as whites, it was widely believed that Governor Walker of Virginia would attempt to eliminate these provisions as soon as Virginia was readmitted to Congress. Cong. Globe at 402-03.

Representative Ward supported the school, jury, and suffrage conditions as "simple, just, patriotic" and as necessary to a republican form of government. Id. at 485. Representative Farnsworth agreed, stating that "so long as you secure the jury-box, the ballot-box, and school privileges to the colored people of Virginia, . . . so long you will have there a republican form of government . . ." Id. This theme was amplified by Representative Scofield and expressly linked to the provisions of the Fourteenth Amendment:

> [T]his new constitution of Virginia has very wisely provided for equal franchise and equal education in that Commonwealth . . . we admit the state with the qualification that it shall not go back upon those just provisions of its constitution after its admission.

* * *

> Then the next question is [sic] reconstruction with us was to educate these blacks so that they could not be restored to slavery; to destroy all hope of the restoration of slavery, and therefore all hope of a separate government. We began first with the civil rights bill, then with the Freedmen's Bureau bill, and then with the fourteenth article of amendment, and now with the fifteenth article of amendment to the Constitution.

Id. at 500; see also id. at 717 (remarks of Representative Butler). The bill as initially passed in the House did not contain any of the above conditions, id. at 502-03, but the Senate restored the conditions 14/, id. at 643, and the House concurred in

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14/ As adopted by the Senate, the condition regarding schools read as follows:

> that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

Id. at 643.

the Senate amendments restoring these conditions. Id. at 717; see Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63.

On February 3, 1870, the House received a bill to admit Mississippi to representation in Congress. This bill contained a proviso identical to that contained in the earlier Virginia bill, preventing the state from amending its constitution to deny equal suffrage, jury participation, and equal access to state common schools. The bill passed the House immediately, Cong. Globe at 1014, but was debated at length in the Senate.

Senator Howard of Michigan justified each of the "fundamental conditions," id. at 1218, contained in the House bill by the Constitutional clause guaranteeing a

republican form of government to all states. Senator Thurman of Ohio, in a lengthy speech attacking the constitutionality of these fundamental conditions, rhetorically asked,

> When did it become essential to a republican form of government that there should be public schools and that everybody should have an equal right in those schools?

Id. at 1218. If a universal education provision was part of the guaranty clause, Senator Thurman asked, "how many republican States were there when the Constitution of the United States was formed?" Id.

Three days later, on February 14, 1870, both Senator Howard and Senator Morton of Indiana responded to Senator Thurman's constitutional arguments. In

regard to the provision relating to schools, Senator Howard stated,

> Now, sir, if there be any one proposition more generally admitted than another among American citizens, politicians, and statesmen, it is that in order to uphold and maintain a republican form of government such as is understood and practiced on this continent, the diffusion of knowledge by means of primary schools is the greatest, the safest, and the most effectual instrument.

Id. at 1253. More specifically, Senator Morton challenged Senator Thurman's views on the ground that the definition of a republican form of government was not a static concept fixed in time:

> I controvert the position that this clause means the same thing now in the Constitution that it did in 1787, because every amendment that is put into that instrument which is in conflict with an existing clause modifies and changes the meaning of that existing clause.

* * *

> I reply to the argument of the Senator from Ohio, that the definition of a republican form of Government once consistent with the slavery of one half or two thirds of the people; once consistent with the denial of civil rights to one half of the people; once consistent with the denial of education and of protection to a majority of the people, has been changed by the repeated amendments of the Constitution, and such a Government would now be utterly inconsistent with a republican form of government as defined by the Constitution of the United States. (emphasis added).

Id. at 1254-55. The bill was passed by the Senate on February 17, 1870. Id. at 1366, Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68. Less than two months later, Texas was admitted to representation in Congress upon fulfillment of the same "fundamental conditions." See discussion, supra, at 33.

The debates and votes in Congress on these readmission statutes indicate wide acceptance of the view that the Fourteenth Amendment altered the concept of a republican form of government to include equal access to state schools. The debates also confirm Congress' original view that access to education was a fundamental interest protected by the Fourteenth Amendment.

II. ACCESS TO BASIC EDUCATION IS A FUNDAMENTAL INTEREST OF UNDOCUMENTED ALIEN CHILDREN RESIDING IN TEXAS.

As demonstrated above, the Fourteenth Amendment in general and the equal protection clause in particular were promulgated with the express purpose of eradicating

invidious discrimination against former slaves which had persisted in the South notwithstanding the abolition of slavery itself. The historical origins of the equal protection clause have special significance in this case not only because they reveal the fundamental importance of the interest at stake, but also because the social and economic circumstances of undocumented aliens in Texas resemble in many ways the condition of those former slaves for whose benefit the Fourteenth Amendment was originally enacted.

Although by its terms Section 21.031 applies to all undocumented alien children in Texas, appellants do not deny that the statute was enacted in response to the presence in Texas of undocumented alien children of Mexican origin, and that its

impact is felt almost exclusively by such children. In fact, one of the district courts below found that "the State generally monitors compliance with [Section 21.031] by examining the immigration status or citizenship of Spanish-surnamed persons . . ." In re Alien Children Education Litigation, 501 F. Supp. 544, 574 (S.D. Tex. 1980).

This Court has previously taken notice of the long history of discrimination in education and other areas against Hispanics in Texas. Casteneda v. Partida, 430 U.S. 482, 487-88, 493 (1977); White v. Regester, 412 U.S. 755, 768 (1973). This history reveals that there are numerous parallels between the historical condition of Hispanics in Texas (particularly of undocumented aliens), and that of the

recently freed slaves at the time of the Civil War. Indeed, the Texas Advisory Committee of the United States Civil Rights Commission has stated in a recent report that "the situation in South Texas for the undocumented person. . . resembles the early slavery in the United States." Texas Advisory Committee, Sin Papeles: The Undocumented in Texas (1980) at 25 [hereinafter "The Undocumented in Texas"]. 15/

Like former slaves, undocumented Hispanics in Texas are a class of persons whose presence in this country is a direct outgrowth of an economic demand for inexpensive labor. Moreover, like the institution of slavery in the South, the

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15/ In re Alien Children Litigation, Plaintiff's Trial Exhibit 12.

exploitation of undocumented aliens in Texas has been sanctioned and even supported by deliberate policies of both the federal and state governments. Dr. Gilbert Cardenas, certified at trial as an expert on Hispanic immigration, 16/ testified that historically the touchstone of federal and state policy in this regard was the temporary importation of Mexican contract laborers. In re Alien Children Litigation, Trial Transcript, Vol. I, at 59. By relying on temporary contract laborers, the United States could "utilize Mexican workers on a temporary basis and then remove them or insure the removal when they were no longer useful to the economy and no

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16/ In re Alien Children Litigation, Trial Transcript, Vol. I, at 54-55.

longer needed by the particular employer." Id. at 60. As stated by the Texas Advisory Committee,

> [T]he Mexican people of this area and their descendants have historically been the providers of cheap labor to the industrial and agricultural interests of the United States. United States immigration policy has tended to reflect the social and economic perspective of the "Mexican" as a cheap labor commodity to be barred in times of recession or imported in great numbers when needed.

The Undocumented in Texas, supra, at 2.

The active role of Texas employers in soliciting undocumented aliens for employment in Texas was elaborated at trial in one of the present cases. Gloria Cabrera, a regional attorney for the United States Commission on Civil Rights, testified that there exists a "black market" in Texas for undocumented alien workers. In re Alien Children Litigation, Trial Transcript,

Vol. XI, at 1196. As part of this black market, employers in the United States contract with individuals to enter Mexico to recruit Mexican laborers for the United States market. Ms. Cabrera testified that Immigration and Naturalization Service personnel referred to this practice as "slavery" and considered the victims of these contract labor arrangements as "slaves of this present period." Id.

The vulnerability of undocumented Hispanics resulting from their legal and political status makes them natural targets of exploitation by their employers. See Comptroller General of the United States Report to the Congress, Illegal Aliens:

Estimating Their Impact on the United States (1980) at 14-22. Approximately one-fourth of undocumented workers in the Southwest in 1975 earned less than the minimum wage. Id. at 20-21. Moreover, the Report points out that "[m]any illegal aliens do not place demands on their employers for fear of being turned in to INS officials and being deported." Id. at 20.

Undocumented Hispanics are exploited not only by their employers but also, in a passive sense at least, by the governments to which they contribute their tax dollars. Several independent studies have shown that over three-quarters of undocumented workers have income tax and social security deducted from their wages, and pay more in federal and state taxes than the value of

the services they receive in return. In re Alien Children Litigation, Trial Transcript, Vol. I (testimony of Dr. Cardenas) at 80-83. Moreover, because Texas relies on a state sales tax instead of an income tax, undocumented workers contribute to state taxes on an equal footing with citizens and documented aliens.

As in the case of slavery prior to the Civil War, the economic subjugation of Hispanics in Texas -- documented or undocumented -- has been accompanied by invidious discrimination whose effect has been to perpetuate a permanent under-class of Texas residents. In Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972), aff'd in relevant part sub. nom. White v. Regester, 412 U.S. 755 (1973), a three judge federal district court found:

> Because of long-standing educational, social legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called de jure and some of a so-called de facto character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others. [343 F. Supp. at 728.]

The finding of the court in Graves is confirmed by numerous cases and studies which show that persons of Mexican descent, in Texas and elsewhere in this country have historically been treated unequally in the areas of access to courts, 17/

17/ See Casteneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S. 475 (1954).

representation in state legislatures, 18/ employment, 19/ and housing. 20/

Perhaps the most direct form of discrimination against Hispanics, and certainly the most relevant to the present cases, appears in the history of education of Hispanics in Texas. Separate "Mexican" schools were established in Texas as early as 1902 and by the 1920's tri-ethnic school systems with separate schools for Anglo,

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18/ See White v. Regester, 412 U.S. 755, 767-70 (1973).

19/ See Greenfield and Kates, Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866, 63 Calif. L. Rev. 662, 718-23 (1975).

20/ See Moore and Mittelbach, Residential Segregation in the Urban Southwest, Mexican American Study Project, UCLA Advance Report IV (1966); Mittelbach and Marshall, The Burden of Poverty, Mexican American Study Project, UCLA Advance Report V (1966).

black, and Hispanic children were well-established throughout the state. Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. Law R. 307, 313-14 (1972). Not until 1948 did state education authorities repudiate segregation of Hispanic students as an expression of official policy. Id. at 312, 336-37.

Notwithstanding this change in official policy, segregation of Hispanics in Texas public school districts continued well after 1948 and well after this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). In 1972, the Fifth Circuit in two separate cases held that the public schools of the Austin and Corpus Christi Independent School Districts still unconstitutionally segregated Hispanic from

Anglo school children. United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972) (en banc); Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 922 (1973). In both cases, the Fifth Circuit found that these segregated schools caused Hispanics to suffer a deprivation of educational opportunity. United States v. Texas Education Agency, supra, at 862; Cisneros, supra, at 150. Moreover, statistical surveys confirm that the extent of segregation of Hispanics in Texas and the South in general has increased since 1972. See National Center for Education Statistics, The Condition of Education for Hispanic Americans (1980) at 48, Table 2.05.

The historical parallels between discrimination against blacks in the post-Civil War South and discrimination against Hispanics in Texas are by no means accidental. Both groups were encouraged or brought into this country to satisfy the need for a source of inexpensive labor. Despite their important economic contribution, both groups were segregated from the dominant white society and, because of their political, social and economic vulnerability, were denied basic political, civil, and economic rights, especially in the area of education. In both cases discriminatory treatment perpetuated a permanent subclass of benighted individuals neglected or discriminated against by the state.

There are, to be sure, distinctions between the legal status of undocumented aliens and the legal status of post-Civil War freedmen. It is important to recognize, however, that the framers of the Fourteenth Amendment did not consider the fundamental importance of educational opportunity to arise solely from the legal and political status of those being discriminated against. This point is most vividly demonstrated by the fact that many of the most prominent proponents of the Fourteenth Amendment did not consider that that amendment gave freedmen the right of immediate suffrage. See Bickel, supra, at 58. In their view, it was necessary to establish an interim period in which "to educate, improve, enlighten, and Christianize the negro." See text, supra,

at 23-24. Significantly, Thaddeus Stevens, the prominent Radical Republican from Massachusetts, was convinced to accept this delay in suffrage by the arguments of Robert Dale Owen, an influential reformer who was quite active in the affairs of the Joint Committee. See Bickel, supra, at 42. Owen told Stevens that the Negro was not yet ready to vote or hold office and that suffrage was not now the Negro's immediate need: "[h]e thirsts after education, and will have it if we but give him a chance, and if we don't call him away from the school-room to take a seat which he is unfitted to fill in a legislative chamber." 21/

21/ Owen, Political Results From the Varioloid, 35 Atlantic Monthly 660, 663 (1875).

The perceived need to educate the freedman prior to providing suffrage demonstrates that the right of access to basic education was not viewed merely as a corollary of the right to vote or other legal rights. Education for freedmen was perceived as a means of eliminating the vestiges of slavery and ensuring the dignity and participation of all people in American society.

Moreover, to the extent that the Fourteenth Amendment was designed to prepare former slaves to assume a higher political or legal status in the future, it is obviously contrary to the intent of that amendment to predicate undocumented aliens' equal protection rights solely on their present status. The evidence in these cases demonstrates that many of the

undocumented alien children in Texas will likely become either citizens of the United States or documented aliens. See In re Alien Children Litigation, supra, at 558; Doe v. Plyler, 458 F. Supp. 569, 581, n.14 (E.D. Tex. 1978), aff'd., 628 F.2d 448 (5th Cir. 1980). In addition, the present Administration has submitted to Congress a proposal which, if adopted, would establish a new legal status of "renewable term temporary resident" for undocumented aliens present in the United States prior to January 1, 1980. This proposal would thereby allow the long-term presence in the country of many undocumented aliens presently residing in Texas. See Statement by the President, United States Immigration and Refugee Policy, Weekly Compilation of Presidential Documents 829, 830 (July 30, 1981).

There is no need to elaborate on the overwhelming harm to individuals and to society that will be caused by denying undocumented alien children the means of obtaining a basic education. The record is replete with testimony establishing the psychological, social, and economic deprivation caused by a lack of basic education. See, e.g., In re Alien Children Litigation, supra, at 561-62. As did the framers of the Fourteenth Amendment in considering the need to educate the freedman, this Court must recognize that the inevitable result of denying basic education to any class of persons - regardless of their present legal status - will be the perpetuation of a permanently inferior caste, exposed to exploitation by the rest of society. There can be no doubt that if Section 21.031 is

upheld it will permanently foreclose the future for one small portion of Texas residents.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the decisions below be affirmed.

Respectfully submitted,

ROBERT J. KENNEY, JR.
815 Connecticut Ave, N.W.
Washington, D.C. 20006
(202) 331-4707
(Attorney of Record)

SARA-ANN DETERMAN
DAVID M. GISCHE

Attorneys for Amici Curiae

Of counsel:

HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006

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No. 80-1538

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, and STATE OF TEXAS, et al.,

Appellants,

VS.

J. AND R. DOE, as Guardians Ad Litem for I. DOE, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS JAMES PLYLER, ET AL.

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad

public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument regarding the issues at stake in this case such as the right of illegal aliens to bring suits in equity to preserve the fruits of their wrongdoing.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 628 F.2d 448 (5th Cir. 1980).

STATEMENT OF THE CASE

A group of illegal aliens has challenged, on behalf of their children, also illegal aliens, the constitutionality of Section 21.031 of the Texas Education Code and the implementing policy of the Tyler Independent School District (TISD). Section 21.031 provides for the free public education of children who are lawful residents of Texas, including citizens and legally admitted aliens. TISD implemented the statute by charging a tuition of $1,000 per year for each illegal alien as a prerequisite to enrollment in the Tyler public schools. The illegal alien plaintiffs sought and obtained an injunction from the United States District Court for the Eastern District of Texas on the basis, *inter alia*, that the statute and Tyler policy violated the rights

of illegal aliens to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The injunction was affirmed on that basis by the United States Court of Appeals, Fifth Circuit.

SUMMARY OF ARGUMENT

1. Injunctions are equitable proceedings and require invocation of the equitable maxim forbidding judicial assistance to those with unclean hands. This maxim prohibits maintenance of suits by illegal aliens to preserve the fruits of their wrongdoing.

2. States are permitted to limit their public resources to citizens of the state and legally admitted aliens.

3. Texas has a rational basis for its policy in refusing to undermine the federal laws which its officers are sworn to uphold.

ARGUMENT

I

ILLEGAL ALIENS' UNCLEAN HANDS PRECLUDE THEM FROM TAKING ADVANTAGE OF THEIR OWN WRONGDOING

This case was brought by "a group of undocumented [illegal alien] children, represented by their parents," seeking to enjoin Texas Education Code § 21.031 as a denial of the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. *Doe v. Plyler*, 628 F.2d 448, 450 (5th Cir. 1980). The statute at issue provides that children who are citizens of the United States or legally admitted aliens shall be permitted to attend the public free schools of the district in which they

reside or in which their parent or guardian resides. Tex. Educ. Code § 21.031. The statute further provides that such citizens and lawfully admitted aliens between the ages of five and twenty-one are entitled to the benefits of the Available School Fund. *Id.* TISD implemented the policy of this statute by charging a tuition of $1,000 per year for each illegal alien child as a prerequisite to enrollment in the Tyler public schools. *Doe v. Plyler,* 628 F.2d at 450. The illegal alien parents and children also sought to enjoin TISD from enforcement of this policy. *Id.* The District Court's granting of these injunctions was affirmed by the Court of Appeals. *Id.* at 461.

In exercising this injunctive power, the courts below were acting as courts of equity. *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company,* 363 U.S. 528, 531-32 (1960). As this Court held in *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 244-45 (1933):

> "'It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands.' . . . The governing principle is 'that whenever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pom. Eq. Jur. 4th ed. § 397. This court has declared: 'It is a principle in

> chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' Bein v. Heath, 6 How. 228, 247, 12 L. ed. 416, 424." *Keystone Driller,* 290 U.S. at 244-45 (emphasis in original).

The courts below failed to apply this principle of equity, even while acknowledging that plaintiff illegal aliens were breaking the law.

> "The plaintiffs undeniably stand in violation of federal law, but certainly they have committed no moral wrong. As children they are under the actual and legal control of their parents. [Footnote omitted.] To suggest that plaintiffs are being excluded from education for their own illegal actions places form over substance." *Doe v. Plyler,* 628 F.2d at 457.

It is difficult, even in this modern era, to understand a court holding that while plaintiffs are "undeniably" committing a crime, they are "certainly" committing "no moral wrong." The State of Texas and the lay public may be forgiven for their old fashioned belief that the commission of any crime is morally wrong. Obedience to validly enacted law is the basis of our republic. Neither plaintiffs nor the Court of Appeals challenged the constitutionality of the federal immigration laws. Yet, the court states its certainty that in violating these federal laws, plaintiffs "committed no moral wrong." It is this type of statement which shreds the fabric of respect for law in society.

If the Court of Appeals was trying to say that the illegal alien children were morally blameless for breaking the law because they were under the control of their parents, the court should not then have referred to "plaintiffs." As the court noted earlier, the litigation was initiated by "[a] group of undocumented children, represented by their parents." *Id.* at 450. Thus, the litigation was conducted not merely by the children but by their parents as well. The Court of Appeals, rather cavalierly, shrugged the whole matter off saying:

> "But we have ascertained no legal precedent for determining that the commission of a federal misdemeanor [footnote omitted] may *in and of itself* serve as the legitimate basis for state-imposed disabilities." *Id.* at 458 (emphasis in original).

This statement directly contradicts the principles of equity. This Court held in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945), that the maxim of clean hands closes the doors of a court of equity to one tainted with bad faith relative to the matter in which he seeks relief and demands that a party shall have acted fairly and without fraud or deceit as to the controversy in issue. The Court of Appeals blithely dismisses the violation of immigration laws as a mere misdemeanor, failing to note that under immigration law, second and subsequent illegal entries are felonies (8 U.S.C. § 1325) and that at least some of the plaintiffs are probably felons. The degree of the offense, however, is not the controlling factor.

> "Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a

crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

"Moreover, where a suit in equity concerns the public interest as well as the private interest of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of this transgression but averts an injury to the public." *Precision Instrument*, 324 U.S. at 815.

Illegal entry into the United States is a crime, punishable either as a felony or a misdemeanor, and is therefore wrong, both legally and morally. Because this lawsuit is one concerning the public interest of the people of Texas and others who believe in the moral sanctity of law, the courts are bound to give the principle of clean hands even wider significance. Equity, as well as our national tradition of respect for the law, demands that plaintiffs in this case be prevented from enjoying the fruits of their crimes at the expense of the lawful residents of the state.

In *Alonso v. State of California*, 50 Cal. App. 3d 242, 254 (1975), the California Court of Appeal, citing *Reid v. Immigration & Naturalization Service*, 420 U.S. 619 (1975), ruled:

"To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act."

The essence of equity therefore prevents plaintiffs from brazenly flouting federal law while simultaneously using the federal judiciary to claim benefits restricted under state law to those observing the laws. Plaintiff-appellees have no standing in equity to claim the benefits of equity; their case should be summarily dismissed.

II

STATES MAY RESTRICT BENEFITS TO LAWFUL RESIDENTS

The Texas statute makes free public education available only to residents of the several school districts. Tex. Educ. Code § 21.031(b), (c). This restriction applies not only to illegal aliens but to lawful residents of other states. The Court of Appeals concluded that residents from outside the state cannot claim a Fourteenth Amendment right to attend the Texas schools because only persons within the jurisdiction of Texas can claim the equal protection of its laws. *Doe v. Plyler*, 628 F.2d at 457 n.24. This rationale is too facile.

It is only too obvious that a resident of a neighboring state would only have to commute from a neighboring state across the Texas border; he would then be in Texas and within the jurisdiction of Texas laws. Under the court's rationale, this out-of-state resident would then be entitled to a free public education at the expense of the Texas taxpayers. This would be an absurd result. What the court has overlooked, and the Texas Legislature has not, is the concept of lawful residence.

This Court held in *Elkins v. Moreno*, 435 U.S. 647, 668 (1978), that the question whether a certain class of law-

fully admitted aliens could obtain lawful permanent residence or domicile in a state "is purely a matter of state law." Obviously the State of Texas in enacting Texas Education Code § 21.031 determined that illegal aliens cannot become domiciliaries of the state. This is consistent with the law in federal jurisdictions.

In *Barber v. Varleta*, 199 F.2d 419, 422 (9th Cir. 1952), the court held:

> "Under the rule commonly applied to unlawful entries into the United States by aliens generally, appellee could not have established a domicile in continental United States or acquire a lawful permanent residence there."

The recent decision of *Castillo-Felix v. Immigration & Naturalization Service*, 601 F.2d 459 (9th Cir. 1979), similarly upheld the Immigration and Naturalization Service's position that an alien cannot be lawfully domiciled in this country unless "'lawfully admitted for permanent residence.'" *Id.* at 463.

This Court, in dealing with questions of state exclusion of aliens from public benefits such as financial assistance for education, has acted in the context of lawfully admitted *resident* aliens. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 2 (1977). As noted above, the critical question in *Elkins v. Moreno, supra*, was whether, under state law, the plaintiffs were domiciliaries and therefore entitled to state financial assistance. This Court has made clear that a state may exclude nonresidents, alien or otherwise, from its educational assistance.

In *Vlandis v. Kline*, 412 U.S. 441 (1973), this Court held unconstitutional a Connecticut statute which established a permanent and unrebuttable presumption that students who had an out-of-state address within one year preceding application for admission to the state university remained nonresidents. This Court found such a presumption was not necessarily true and therefore violated the Due Process Clause of the Fourteenth Amendment. This Court went on to observe:

> "We are aware, of course, of the special problems involved in determining the *bona fide residence* of college students who come from out of State to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, *for purposes of tuition and fees, just because they go to school there.* ... We fully recognize that the State has a legitimate interest in protecting and preserving the quality of its colleges and universities and *the right of its own bona fide residents* to attend such institutions *on a preferential tuition basis.*" *Id.* at 452-53 (emphasis added).

Justice White concurred in the judgment on the basis that although the state

> "may legally discriminate between its residents and nonresidents for purposes of tuition, here [it] invidiously discriminates among at least three classes of bona fide Connecticut residents." *Id.* at 456.

Both opinions make clear that the state may indeed discriminate for purpose of tuition between residents and nonresidents. What the state may not do is discriminate

between classes of bona fide state residents. What distinguishes the case at bar is that plaintiffs are not bona fide residents of the state; they are persons whose very presence in the state is illegal. Under *Vlandis* then, Texas has no duty to make its schools available to non bona fide residents on a tuition free basis.

III

THERE IS A RATIONAL BASIS FOR DECLINING TO PROVIDE FREE SCHOOLING TO ILLEGAL ALIENS

This Court held in *Graham v. Richardson*, 403 U.S. 365, 371 (1971), that under traditional equal protection principles a state retains broad discretion to classify, including classifications in the area of economics and social welfare, provided that such classification has a reasonable basis. Although classifications based on alienage are inherently suspect and subject to close judicial scrutiny (*id.* at 371-72) we are not here dealing with a classification based on alienage but on legal residence. State citizens and legally admitted aliens qualify for free schooling. But out-of-state residents, including illegal aliens, do not qualify. Legal residents of New Mexico, Oklahoma, or Louisiana suffer the same disabilities as legal residents of Mexico, Guatemala, or Canada who have entered the country unlawfully. As noted earlier, *Vlandis v. Kline* holds that a state has a legitimate interest in protecting and preserving the right of its own bona fide residents to attend its institutions of public education on a preferential tuition basis. 412 U.S. 452-53.

Even if the classification were not based on lawful state residence but upon the distinction between illegal aliens

and everyone else, such distinction has a rational basis. In *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court recognized the right of Congress to exclude certain classes of aliens from public benefits:

> "In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests." *Id.* at 80 (emphasis in original).

While the powers of Congress to exclude all types of aliens from benefits admittedly exceed those of the states, the states are not therefore preempted from control over state benefits. In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court reversed a lower court ruling that California was preempted from prohibiting the employment of illegal aliens where such employment would have an adverse effect on lawful residents. This Court noted that states possess broad authority under their police powers to regulate employment relationships so as to protect workers within the state. *Id.* at 356. This Court held:

> "California's attempt in § 2805(a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation. ... These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. *In attempting to pro-*

> *tect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." Id.* at 356-57 (emphasis added).

These justifications are analogous to those advanced by Texas in support of its school policy and rejected by the Court of Appeals. *Doe v. Plyler,* 628 F.2d at 458-60. It is ironic that the Court of Appeals implicitly suggested that Texas deal with its illegal alien problem by prohibiting the employment of illegal aliens. The irony lies in the fact that the court's rationale in striking down the Texas school policy would apply with even more force to the suggested employment policy.

This Court held in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), that education is not a fundamental right. This may be contrasted with this Court's holding in *Truax v. Raich,* 239 U.S. 33, 41 (1915), that the right to work for a living is a fundamental right, indeed the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. In striking an employment limitation for lawfully admitted aliens, the Court noted:

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states." *Id.* at 39-40.

Here, Texas is availing itself of this right to limit the distribution of its common resources to its citizens and law-

fully resident aliens as against illegal aliens and citizens of other states.

If a nonfundamental right such as education cannot be denied to illegal aliens, as the Court of Appeals holds, how can that court suggest that the fundamental right of employment should be denied. The answer seems to be that the lower court feels more sympathy for school age children than for adult workers. While such an emotion is humanly understandable, it is not the basis on which to render constitutional decisions striking down state laws.

In *Alonso v. State of California, supra,* the California Court of Appeal concurred in the rationale expressed by state authorities in denying unemployment insurance benefits to illegal aliens.

> " 'It would be an absurd consequence for the Department of Human Resources Development of the State of California to assist a person, an illegal entrant, seeking advantages that, in our opinion, are available only to citizens and others who are lawfully admitted to our country. Denied unemployment benefits, he will not be as likely "to succeed in maintaining himself and accomplishing his cheat upon the government." . . .
>
> " 'We do not feel compelled by the Fourteenth Amendment or the laws adopted under it to grant benefits to the claimant. If an alien comes here legally, he is entitled to equal protection of the law (Ex parte Kurth, 28 Fed.Supp. 258, 263), but the claimant, being an illegal entrant, "does not have the status of a nonresident alien, or resident alien, and while it may be difficult according to the strict definitions of international law to classify him, it clearly appears that he is a defiant person challenging the ability of this coun-

try to enforce its own laws." The protection of the Fourteenth Amendment does not extend to giving an illegal entrant the right to demand the assistance of the State "in frustrating the plain purpose of Congressional Acts regulating immigration." . . .

" 'Our conclusion that the claimant is not entitled to benefits has a rational basis related to a national as well as state public policy and is reasonably calculated to carry out that policy (*Dandridge v. Williams* (1970), 397 U.S. 471, 90 S.Ct. 1153). . . .

" 'We have an obligation not to subvert the federal statutory scheme which controls the presence of aliens and immigrants in this country.' " *Id.* at 252-53.

In the same manner, the State of Texas has a rational basis to deny its free public education to defiant illegal aliens who mock the inability of this country to enforce its laws. The Fourteenth Amendment does not require Texas to assist these persons in frustrating the congressional purpose in regulating immigration. State officers are sworn to uphold federal as well as state law. Nothing in the Fourteenth Amendment requires state authorities to be accessories to criminal violations.

CONCLUSION

Plaintiff-appellees come defiantly before the courts of this nation, flouting their violations of federal immigration laws in violation of the rules of equity and common sense. The equitable principle of clean hands commands that the courts not assist law breakers in reaping the fruits of their violations. Nor should plaintiffs succeed on the merits. Illegal aliens are not lawful residents of a state and are not entitled to the privileges extended to such residents.

A state has a rational basis in maintaining its integrity through denying its assistance to persons who brazenly defy the law.

For the reasons set forth in this brief, amicus curiae Pacific Legal Foundation urges this Court to reverse the decision of the Court of Appeals and affirm the constitutionality of Texas Education Code § 21.031 and the policy of the Tyler Independent School District.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capital Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

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ORRIN W. JOHNSON, ESQ.
402 East Van Buren
Harlingen, Texas 78550
(512) 423-0213
Of Counsel

NEAL KING, ESQ.
P. O. Box 1025
Mission, Texas 78472

TONY MARTINEZ, ESQ.
954 E. Madison, Suite 3
Brownsville, Texas 78520

TRAVIS HIESTER, ESQ.
P. O. Drawer 3725
McAllen, Texas 78501

JACK WIECH, ESQ.
55 W. Elizabeth
Brownsville, Texas 78520
Attorneys for Amici Curiae

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1. Does Section 21.031 of the Texas Education Code, which requires nonresident citizens and nonresident aliens including illegal aliens, to pay tuition in public schools, but which exempts all resident citizens and resident aliens from such charges, contain an invalid classification in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. May Section 21.031, which provides for tuition-free education in public schools only for "residents" of the school district, define illegal aliens as nonresidents of the school district?

3. Is there a rational basis for the classification between residents and nonresidents created by Section 21.031?

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CONSTITUTION AND STATUTES INVOLVED

THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS EDUCATION CODE § 21.031, which provides in pertinent part:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

8 U.S.C. § 1324, which provides in pertinent part:

> (a) Any person including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> * * *
>
> (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place including any building or any means of transportation; or
>
> (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—
>
> any alien, including any alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

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INTEREST OF AMICI CURIAE

The amici curiae are school districts of the State of Texas located in the delta area known as the Lower Rio Grande Valley, in the southernmost portion of the state.

They lie on or near the Rio Grande River, which forms the largest portion of the boundary between the United States and Mexico.

The population of the two counties in which the amici school districts are situated is predominately of Hispanic origin—more than seventy-five percent of the persons in Cameron County and more than eighty percent of those in Hidalgo County are of Spanish descent. U. S. Dept. of Commerce, Bureau of the Census, *Advance Reports, 1980 Census of Population and Housing, Texas*, Pub. No. PHC 80-V-45, pp. 7, 17 (March 1981). The two counties are also among the fastest growing areas in the nation. Between 1970 and 1980, the population of Cameron County increased by forty-nine percent, and Hidalgo County experienced a fifty-six percent increase in population. *Id.*

In contrast to its surging population growth, the per capita income of the Valley is near the lowest in the United States. According to the latest figures available, the Hidalgo County metropolitan market (McAllen-Pharr-Edinburg SMSA) ranked *last* out of the three hundred largest such markets in the country in terms of per capita disposable personal income. I *The Survey of Buying Power Data Service, 1980* (Sales & Marketing Management) Table 3-8. The Cameron County metropolitan market (Brownsville-Harlingen-San Benito SMSA) ranked 298th out of three hundred in the same category. *Id.* in addition, the ad valorem tax bases of these border school districts are well below average. Hensley, *Mexican Immigrant-Alien Student Study 1975-76*, p. 66 (1976).

These overburdened school districts are faced with the task of bearing the primary responsibility for educating

illegal aliens from Mexico if the Texas statute in question is held to be unconstitutional. It is they who will have to bear a disproportionate part of the financial costs that will result from a ruling of unconstitutionality. It is their students who will suffer and their educational programs which must be diluted if they are required to educate a large number of illegal aliens free of tuition. Despite the direct impact on them of adjudications of unconstitutionality, these districts, like those of the suburban areas around the City of Detroit in the Detroit school desegregation case, *Milliken v. Bradley*, 418 U.S. 717, 729-30 (1974), are not parties to and have not participated in, the litigation that will decide their fate. These school districts seek to have the Court understand their position on the validity of the Texas statute in question, a position which has only been touched upon and not pressed by the parties to the litigation.

SUMMARY OF ARGUMENT

Section 21.031 of the Texas Education Code creates a classification between residents, whether citizens or aliens, and non-residents, whether citizens or aliens. The state may validly create such a classification for tuition purposes in its schools. The statute does not create a classification based on citizenship or alienage, but even if it did, such a classification would be valid insofar as applicable to illegal immigrants.

This Court has ruled in a similar setting that the question of whether an alien may establish residency within a state for tuition purposes is purely a matter of state law. The Texas statute merely states Texas law that a person unlawfully within the state may not thereby estab-

lish the domicile necessary to qualify for tuition-free education.

If illegal entrants are entitled to equal protection of the laws, the proper test to be applied in determining the validity of Section 21.031 is the rational basis test. The classification created by the statute is rationally related to the legitimate state interest of providing free public education to Texas residents while at the same time preserving the limited resources available for such education. The classification in Section 21.031 is also reasonably related to the interest of Texas in deterring illegal entry into the country and is in harmony with federal immigration policy. Finally, the classification is rationally related to the state's interest in teaching its children respect for, and obedience to, the rule of law in our society.

ARGUMENT

I. SECTION 21.031 DOES NOT CONTAIN ANY CLASSIFICATION IN TERMS OF ALIENAGE OR CITIZENSHIP NOR ANY CLASSIFICATION BETWEEN LEGAL AND ILLEGAL ALIENS. THE STATUTE DISTINGUISHES BETWEEN RESIDENTS—WHETHER CITIZENS OR ALIENS—AND NON-RESIDENTS—WHETHER CITIZENS OR ALIENS.

The Texas statute in issue does not contain a classification on the basis of citizenship or alienage. Resident citizens and resident aliens are both entitled to tuition-free education. Non-resident citizens and non-resident aliens are both required to pay tuition. The classification was based upon a judgment by the state that a school

district should not provide free education for those who are not legally resident or domiciled within the school district, whether alien or citizen, at the cost of those who are residents. Surely it does not test the bounds of constitutional classification for the state to require the local school districts to afford services to those who are fully and properly ensconced within the districts while denying it to those who are not. This Court has made clear in its rulings that a state may properly treat residents and non-residents differently in determining tuition charges for educational benefits within its schools. Thus, in *Vlandis v. Kline*, 412 U.S. 441, 445, 452-53, 453-54 (1973), the Court said:

> The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and non-resident students, thereby obligating non-resident students to pay higher tuition frees than do bona fide residents. The State's right to make such a classification is unquestioned here.
>
> * * *
>
> We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.
>
> * * *
>
> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

See also, Hooban v. Boling, 503 F.2d 648, 650 (6th Cir. 1974); *Kelm v. Carlson*, 473 F.2d 1267, 1268 (6th Cir. 1973); *Johns v. Redeker*, 406 F.2d 878, 883 (8th Cir. 1969); *Michelson v. Cox*, 476 F.Supp. 1315, 1319 (S.D. Iowa 1979); *Montgomery v. Douglas*, 388 F.Supp. 1139, 1142 (D.D.C. 1974); *Pelletreau v. Savage*, 381 F.Supp. 582, 585 (D.N.H. 1974); *Sturgis v. Washington*, 368 F. Supp. 38 (W.D. Wash. 1973), *aff'd mem.*, 414 U.S. 1057 (1973); *Weaver v. Kelton*, 357 F.Supp. 1106, 1110 (E.D. Tex. 1973); *Clarke v. Redeker*, 259 F.Supp. 117, 123-24 n. 7 (S.D. Iowa 1966).

Thus, the question at hand is whether a state is required by the equal protection clause to treat illegal aliens as residents for purposes of providing educational benefits to those persons. It is a question which the court of appeals below failed to address because that court assumed, incorrectly, that the Plaintiff children were residents of the school districts. As we shall show in the next section of this brief, there can be no such requirement for treating illegal aliens as residents.

Even if, however, the classification created by the statute were one between citizens and noncitizens, or between legally admitted aliens and illegal aliens, such a classification would still be valid. Indeed, it would not be a classification made by the State of Texas, but a classification made by Congress, which has plenary authority over immigration and naturalization. Legal aliens are in this country at the invitation and tolerance of the United States. As such, they are not subject to discriminatory classification by the States, except for overriding policy reasons. *E.g., Ambach v. Norwick*, 441 U.S. 68 (1979); *Memorial Hospital v. Maricopa County*, 415

U.S. 250 (1974). Illegal aliens, however, stand on a different footing. As this Court noted in *Mathews v. Diaz*, 426 U.S. 67, 80 (1976):

> [The] fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. [Emphasis in original.]

The proposition becomes more cogent in light of the fact that an obligation on the part of the school district to provide educational facilities to illegal aliens results in a proportionate diminution in the educational facilities that it can make available to its resident citizens and resident legal aliens.

II. SECTION 20.031 PROVIDES ONLY THAT ILLEGAL ALIENS SHALL NOT BE TREATED AS RESIDENTS FOR PURPOSES OF TUITION-FREE EDUCATION IN THE PUBLIC SCHOOLS.

As heretofore stated, the real question in this case is whether Texas is forbidden to treat illegal aliens as nonresidents of a school district and, therefore, not qualified to receive free tuition. A cognate question was reviewed by this Court in *Elkins v. Moreno*, 435 U.S. 647 (1978). There, the question was whether Maryland had to treat "G-4 aliens," aliens with a nonimmigrant and temporary status in the United States, as domiciled within the state for purposes of receiving reduced tuition at the University

of Maryland. "Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case." 435 U.S. at 662. The Court held that the answer to this question was dependent on federal statutory law and Maryland common law.

In *Elkins*, this Court ruled that the federal statutory law did not require that G-4 aliens maintain a permanent residence abroad. Here, it is clear that the immigration laws do so require as to illegal aliens. It cannot be said of illegal aliens what the Court said of nonimmigrant aliens in *Elkins*, 435 U.S. at 666-67:

> Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status. . . . Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant.

Under the federal immigration laws, illegal aliens may not remain within this country and are subject to immediate deportation. 8 U.S.C. § 1227. While legal aliens may change their status from nonimmigrant to immigrant, 435 U.S. at 667-68, illegal aliens are not equally able to change their status from illegal to legal.

The fact that the laws of the United States did not preclude a G-4 alien from establishing domicile did not resolve the issues in *Elkins*, for the Court made it clear that whether such an alien could establish domicile in

Maryland was a matter of Maryland law: "[T]he question whether G-4 aliens can become domiciliaries of Maryland is potentially dispositive of this case and is purely a matter of state law." 435 U.S. at 698. The case was accordingly remanded to the Maryland Court of Appeals to resolve the question.

The Maryland Court of Appeals held that a G-4 alien could establish domicile in Maryland. *Toll v. Moreno*, 284 Md. 425, 444 (1979). In doing so, however, it carefully delineated the distinction between aliens entitled to remain in this country under the immigration laws and those who are illegally here. It quoted from an earlier Maryland Court of Appeals decision, *Dorf v. Skolnik*, 280 Md. 101, 116-17 (1977):

> If under federal law a particular individual must leave this country at a certain date, or cannot remain here indefinitely, then he could not become domiciled in Maryland. Any purported intent to live here indefinitely would be inconsistent with law. It would at most be an unrealistic subjective intent, which is insufficient under Maryland law to establish domicile. [Quoted, 284 Md. at 442-43.]

The Texas law on the question of the meaning of residence for purposes of its educational code is equally clear. The courts have defined "resident," both for citizens and aliens. Residence means the permanent abode of the school child or his parents. As recently recognized by the Court of Appeals for the Fifth Circuit, the concept of residence under Texas law means something more than mere physical presence—it "is more closely related to the concept of domicile." *Arredondo v. Brockette*, 648 F.2d 425, (5th Cir., Unit A, 1981), *aff'g* 482 F.Supp.

212 (S.D. Tex. 1979). *See also, De Leon v. Harlingen Consol. Indep. School Dist.*, 552 S.W.2d 922 (Tex. Civ. App. 1977, no writ). Federal decisions underline the validity of the Texas proposition in the statute that illegal aliens cannot be residents for purposes of the school code. *See, Castillo-Felix v. I.N.S.*, 601 F.2d 459, 464 (9th Cir. 1979); *Anwo v. I.N.S.*, 607 F.2d 435 (D.C. Cir. 1979). *See also, e.g., United States v. Corsi*, 287 U.S. 129, 133 (1932); *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964); *Werblow v. United States*, 134 F.2d 791, 792 (2d Cir. 1943); *United States v. Day*, 43 F.2d 917 (2d Cir. 1930); *United States v. Chandler*, 152 F.Supp. 169, 177 (D.Md. 1957); *United States v. Anastasio*, 120 F.Supp. 435 (D. N.J. 1954); *United States v. Parisi*, 24 F.Supp. 414, 419 (D. Md. 1938); *In re Scriver*, 9 F.Supp. 478, 479-80 (W.D. N.Y. 1935). Illegal entry by aliens cannot be a basis for legal residence. To hold otherwise would be to abolish judicially any real distinction between residency and non-residency.

Thus, whether under the law of the state, which this Court held to be controlling in *Elkins*, or even under the federal decisions construing the immigration laws, as in *Castillo-Felix* and *Anwo*, illegal aliens cannot establish the residence or domicile requisite to qualify for tuition-free education within a Texas school district.

III. THERE ARE REASONABLE BASES FOR THE CLASSIFICATION CREATED BY SECTION 21.031.

Amici contend that illegal immigrants are not entitled to equal protection of the laws under the fourteenth amendment. If the Court should rule otherwise, amici urge that the proper test to be applied in determining the

validity of Section 21.031 is the rational basis test. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The classification created by the statute is rationally related to the valid governmental interests of preserving the fiscal integrity of the school system, of deterring illegal immigration into the state, and of teaching children respect for law.

A. Fiscal Integrity

The State of Texas has proved that Section 21.031 bears a rational basis to valid fiscal concerns of the state. Certainly, whether one regards it as "compelling" or not, the maintenance of the fiscal integrity of the several hundred school systems in Texas, and particularly in the relatively poor border areas, is a fact in which the state has a legitimate interest. *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973); *Boe v. Wright*, 648 F.2d 432 (5th Cir., Unit A, 1981) (Reavley & Charles Clark, JJ., specially concurring); *Arredondo v. Brockette*, 648 F.2d 425 (5th Cir., Unit A, 1981); *Hernandez v. Houston Indep. School Dist.*, 558 S.W.2d 121, 125 (Tex. Civ. App. 1977, writ ref'd n.r.e.); *De Leon v. Harlingen Consol. Indep. School Dist.*, 552 S.W.2d 922, 925 (Tex. Civ. App. 1977, no writ).

As is forcefully presented in the special concurring opinion in *Boe v. Wright*, 648 F.2d 432 (5th Cir., Unit A, 1981), Texas has a valid governmental interest in providing universal public education while at the same time preserving its limited resources available for such education. Through enactment of Section 21.031, the state has determined the priority in which such resources are to be applied. It is reasonable on fiscal grounds to limit the availability of free public education to persons who are

of a specified age at the beginning of the scholastic year, as Section 21.031 does. Further, it is reasonable on fiscal grounds to charge tuition for children who are wards of other states and who attend Texas schools. *East Texas Guidance & Achievement Center v. Brockette*, 431 F. Supp. 231 (E.D. Tex. 1977) (three-judge court). Amici contend that it is likewise reasonable to limit free education to bona fide residents, who by reason of such publicly provided education will be prepared to make a greater contribution to the state's economy and future. *Starns v. Malkerson*, 326 F.Supp. 234, 241 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

As has been demonstrated, illegal aliens are not bona fide residents of Texas. Their continued presence in the State depends not upon their own subjective intent to remain, but instead upon the enforcement policies and practices of the Immigration and Naturalization Service. Unless their status as illegal entrants is somehow changed, they may never become citizens of the United States nor exercise the right to vote.

Further, the educational needs of illegal alien children are greater than the needs of other students. The district court in *Doe v. Plyler* found the cost of educating a needy child of Mexican citizenship, whether legally or illegally present, to be thirty to forty percent higher than the cost of educating an "average pupil." *Doe v. Plyler*, 458 F.Supp. 569, 577 (E.D. Tex. 1978). That court also found that Mexican immigrant children generally speak little or no English, are badly educated and over age for their grade level. *Id.* at 576. They thus require extensive bilingual education, but there is a shortage of qualified personnel for such programs. *Id.* Additionally, there are readily apparent budgetary and administrative

planning problems attendant with the unforeseeable arrivals and departures of illegal alien children and their families. *See, Arredondo v. Brockette,* 648 F.2d 425, 428-29 (5th Cir., Unit A, 1981). Indeed, the district court in *Doe v. Plyler* found that fiscal economics would result if Section 21.031 were allowed to stand. *Doe v. Plyler,* 458 F.Supp. 569, 576 (E.D. Tex. 1978).

The State of Texas, therefore, could legitimately conclude that providing free public education to illegal aliens would significantly dilute or diminish the educational benefits available to its own residents. Thus, in order to maintain the quality of education, the state enacted Section 21.031. That statute, in conjunction with the transfer provisions of the Texas Education Code, Tex. Educ. Code §§ 21.061-21.081, allows the individual school districts to decide whether to admit illegal alien children to the school system, and whether to charge tuition for their attendance. If tuition is elected, a limitation is set on the amount that may be charged. Tex. Educ. Code § 21.063. The concern of the state with providing adequate public education to its bona fide residents while at the same time maintaining the fiscal integrity of the school system is readily apparent. The state has a legitimate interest in such matters, and the statute is rationally related to that interest. *Vlandis v. Kline,* 412 U.S. 441, 452-53 (1973).

B. Deterring Illegal Immigration

None of the present amici, who are border school districts, were targeted as defendants in the massive *Alien Children* litigation. It is not because of any shortage of potential plaintiffs along the Texas border, which area has the highest proportion of illegal aliens in the state. The reason for the negative selection is because each

amicus actually experiences the multitude of problems arising from the influx of illegal aliens into the state, and the problems here are of a much greater magnitude than those in the defendant districts which lie well to the north. By filing suits in Houston, the plaintiffs and the organizations which sponsor such litigation divorce their cases as far as possible from ready access to adverse proof of valid state interests in the adoption of Section 21.031.

It is one thing to take a detached view of the rather limited facts presented in forums such as Houston or Tyler, some three to six hundred miles from the border, and to decree that illegal aliens must be afforded all educational rights granted lawful residents everywhere in Texas. A decree like the one here appealed from declares a rule, but it leaves the responsibilities to others to solve the practical problems arising from the ruling.

It is quite another thing to be down in the trenches where those problems are. Then one must face and prepare for the awesome effects on this side of the Rio Grande River of a demographic disaster occurring right next door. Trustees in the border school districts, if they are responsible citizens, need to plan ahead, not just for today or tomorrow, but for what will eventuate twenty years from today—which will come upon us sooner than we think. They must do so in view of the demands of the public for better quality education than that which these tax-poor districts are presently able to provide.

It is dramatically evident to us who live on the southern borders of Texas that Mexico's population growth is running out of control. Mexico City, by way of example, has a present population of 15 million inhabitants—more than the population of Texas according to the tentative 1980

United States census figures. Its projected population for the year 2000 A.D. is *31 million persons* . . . making it the largest city on earth. *U.S. News & World Report,* August 18, 1980, p. 54. From a population of 60 million persons in 1975, Mexico is projected to explode into a population of 131 million by 2000 A.D., or an increase of 119 percent. 1, *The Global 2000 Report to the President: Entering the Twenty-First Century* (U.S. Government Printing Office) 1980. Mexico's present 3.4 percent population growth rate is one of the highest in the world. *Report to the Congress of the United States by the Comptroller General* (November 5, 1980), p. 16, U.S. General Accounting Office, Document GGD-81-4. In addition to mind-boggling inflation, Mexico has an unemployment rate estimated to run as high as forty percent. Critchfield, The Houston Post, January 25, 1981, at 68FF, Col. 1. Persons in Brownsville, Texas, who live almost equidistant between Mexico City and Tyler, Texas, can reasonably expect to experience the explosive pressures of this uncontrolled population expansion before anyone else in the United States. Indeed, the district court in *Doe v. Plyler* recognized that the State of Texas is seriously concerned with the increasing impact of Mexican migration upon its public schools. *Doe v. Plyler,* 458 F.Supp. 569, 576 (E.D. Tex. 1978).

The northward pressures upon the border school districts are the product of persons seeking a better life for themselves and their children. One attribute of a better life is the opportunity for a better education, which must surely play a major role in an illegal immigrant's decision to cross the border. Despite this rather obvious fact, the trial court in *Alien Children* stated that the search for a free public education was not a significant

factor in illegal immigration. *In re: Alien Children Education Litigation*, 501 F.Supp. 544, 578-79 (S.D. Tex. 1980). In cases in which border school districts were actually parties, however, proof was adduced which renders that sort of finding highly suspect. *Arredondo v. Brockette*, 482 F.Supp. 212 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir., Unit A, 1981); *De Leon v. Harlingen Consol. Indep. School Dist.*, 552 S.W.2d 922 (Tex. Civ. App. 1977, no writ). The several plaintiffs in those cases admitted that they came to the United States to go to school so they could learn English.

In the *Arredondo* and *De Leon* cases, a research study by Mr. Jim Hensley entitled, *Mexican Immigrant-Alien Student Study, 1975-76*, "The Impact of Students from Mexico Upon Selected School Districts in Texas Counties Adjacent to the Mexican Border," was received in evidence. This same study was introduced as Defendants' Exhibit 6 in the trial of *Doe v. Plyler*, 458 F.Supp. 569, 576 (E.D. Tex. 1978), but if it was introduced in the trial of *Alien Children*, it is not mentioned in the opinion. While the study lists economic reasons as the major reason for Mexican immigrant/alien students coming to the several districts, nevertheless a desire to learn English was also shown to be an important factor contributing to the inflow. At page 80, the study reports: "Five opinions given for Mexicans coming to the United States related to education. It was felt that a primary reason was to learn English. Secondly, crowded Mexican schools was given as a reason for coming." These opinions were supported by statistics, at page 54 of the study, showing a short duration of enrollment for the Mexican immigrant/alien students. Sixty-eight percent had been enrolled for four years or less and almost one-fourth for *only one*

year. Similarly, the District Court in *Alien Children* found that only ten percent of illegal immigrants may be expected to remain in this country permanently. 501 F.Supp. 544, 558 (S.D. Tex. 1980).

Given these facts, and the fact that under the holding of *United States v. Texas,* 506 F.Supp. 405 (E.D. Tex. 1981), bilingual education for *all* grades is required for *all* students of limited English proficiency, Texas school districts are presently required to educate through thirteen grades of tuition-free, bilingual education all children who illegally cross the border—yet only ten percent can be expected to stay here permanently. And this is the reality in the face of the present "atrocious" overcrowded classroom conditions in border and metropolitan areas, the difficulty in recruiting qualified personnel to deal with the special education problems of such students, and the lack of any concomitant increase in the tax base of the school district due to their presence. *Doe v. Plyler,* 458 F.Supp. 569, 576 (E.D. Tex. 1978). Is there any wonder that local school officials and taxpayers are deeply frustrated with a system which requires the free education of illegal aliens at the expense of those who are legally here? *See, e.g.,* Hensley, *Mexican Immigrant-Alien Student Study,* 1975-76, *supra,* at 23.

The United States Constitution should not mandate such an unjust result, especially when the Constitution of Mexico clearly provides that Mexican children have the right to a free public school education in that nation. Mexico Const. tit.I, ch.I, art. 3 (1917, amended 1946). If by moving to the United States, Mexican children no longer have the opportunity to a tuition-free Mexican education, this is a consequence of a voluntary decision on the part of their parents in crossing the border illegally.

Such persons, by their own actions, trade the educational opportunity available to them in Mexico in exchange for anticipated economic and other benefits in the United States. The fact that they decide to do this should not impose upon the State of Texas the duty of making up to them the education opportunity which they traded away. Contrary to the holding of the courts below, loss to the children of tuition-free education was not the result of any wrongful act of the State of Texas. Mexican citizens do have both access and a right to education. In the case of illegal entrants, it may be exercised simply by re-crossing the Rio Grande River, as immigration law requires, and entering school.

Section 21.031 merely provides that if Mexican citizens decide to move illegally with their children into the United States, the State of Texas is not required to become surrogate to Mexico in providing these children with tuition-free education, to which they already have access in their homeland. As such, it is a reflection of the state's concern over illegal immigration and is a reasonable attempt, in harmony with national immigration policy, to lessen the incentive for such illegal immigration into the state. *Boe v. Wright*, 648 F.2d 432 (5th Cir., Unit A, 1981) (Reavley and Charles Clark, JJ., specially concurring).

C. Respect For Law

Both the court of appeals and district courts below have emphasized, correctly, the importance of basic education to a child's development. *See also, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-30, (1973). But we do not teach our children merely through classroom instruction. We teach them many

lessons through our actions, and perhaps one of the most important such lessons concerns the rule of law in our society and our attitude toward it.

As lawyers, we have always taken pride in the fact that ". . . ours has been a 'government of law rather than of men'." Rhyne, *Law Day-U.S.A.: Emphasizing the Supremacy of Law*, 44 A.B.A.J. 313, 314 (1958). The importance of the rule of law and its value to our society has been emphasized by the legislative branch of our government through the designation of Law Day, U.S.A., 36 U.S.C. § 164, and by the executive branch through presidential proclamations. *See, e.g.* Presidential Proclamation No. 4830, 46 Fed. Reg. 20,135 (1981); Presidential Proclamation, No. 4733, 45 Fed. Reg. 16,161 (1980); Presidential Proclamation, 51 A.B.A.J. 389 (1965). A fundamental tenet of the concept of the rule of law is the people's respect for law as a basis of our democratic process. Indeed, we are encouraged to cultivate "that respect for law that is so vital to the democratic way of life," 36 U.S.C. § 164, and are reminded that "respect for justice under law is vital and abiding only when its roots are grounded in our many traditions of religion, ethics, and philosophy with their common teaching concerning law as the foundation of our social order. . . ." Presidential Proclamation, 46 A.B.A.J., 409 (1960). If education is important to a child's proper development, then in a democratic society training in *respect for obedience to law* is surely an essential part of such training and a legitimate state interest.

We discard a value, long-honored in American society, when through our actions we teach children that they must obey some laws but are free to ignore others when it is in their best economic interest. How can we rationalize

our vaunted system of "equal justice under the law" with a constitutional rule which provides tuition-free educational benefits to those who violate our laws and which denies like benefits to their law-abiding peers who remain abroad and patiently await their return to enter this country under immigration quotas? Such a policy teaches children that in our system not only are people not punished for breaking the law, but they are rewarded for doing so. And at a time when disregard for law has reached crisis proportions, how do we explain to school children the actions of the United States, through its Attorney General, in this case? By federal statute, harboring an illegal alien by a party such as a school district is made a felony. 8 U.S.C. § 1324. Illegal entry is a misdemeanor in the first instance and a felony for all subsequent offenses. 8 U.S.C. §§ 1324, 1326. Yet, in this case, the United States is not only failing to enforce its own laws, but is demanding that United States Courts require Texas school districts to admit illegal aliens into their schools and thus harbor them in violation of federal law.

The State of Texas could legitimately conclude that an official state policy of providing tuition-free educational benefits to unlawful immigrants would have the effect of teaching our children that persons need not obey the laws of our country. The state has a legitimate governmental interest in teaching its children respect for and obedience to law, and Section 21.031 is rationally related to this interest.

CONCLUSION

There is no sound basis for declaring that Texas Education Code Section 21.031 violates the equal protection clause of the fourteenth amendment. The statute defines

residency for purposes of public education, and there are rational bases for its enactment. In any event, ordinary fairness and justice dictate that if the rights of border school districts are to be adjudged, this should be done upon the facts present here, not those in school districts hundreds of miles distant.

It is with reason and upon sound authority that amici accordingly urge this Court to reverse the judgments of the Court of Appeals below and to render judgment upholding the validity of Section 21.031.

Respectfully submitted,

ORRIN W. JOHNSON,
Of Counsel

ORRIN W. JOHNSON, ESQ.
402 E. Van Buren Street
Harlingen, Texas 78550
(512) 423-0213
Of Counsel
Attorney, Harlingen Consolidated Independent School District

TRAVIS HIESTER, ESQ.
P. O. Drawer 3725
McAllen, Texas 78501
Attorney, McAllen Independent School District

NEAL KING, ESQ.
P. O. Box 1025
Mission, Texas 78572
Attorney, Mission Independent School District

JACK WIECH, ESQ.
55 W. Elizabeth
Brownsville, Texas 78520
Attorney, San Benito Independent School District

TONY MARTINEZ, ESQ.
954 E. Madison, Suite 3
Brownsville, Texas 78520
Attorney, Brownsville Independent School District

Attorneys for Amici Curiae

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No. 80-1538, 80-1934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, ET AL., AND STATE OF TEXAS *Appellants*

VS.

J. AND R. DOE, as Guardians Ad Litem for I DOE, ET AL., *Appellees*

IN RE ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS AND TEXAS EDUCATION AGENCY *Appellants*

VS.

UNITED STATES *Intervenor-Appellee*

AND
CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN *Appellees*

On Appeal From The United States Court of Appeals For The Fifth Circuit

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Brief of Amicus Curiae Texas Association of School Boards In Support of Appellants

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John S. Aldridge
Attorney for Amicus Curiae
Texas Association of School Boards
406 East 11th Street
P.O. Box 400
Austin, Texas 78767
512/476-9116

Questions Presented

1. Whether aliens unlawfully present in the United States are persons to be afforded the guarantees of the equal protection clause of the fourteenth amendment.

2. If the fourteenth amendment's equal protection clause applies to persons illegally present in the United States, whether a state must provide a tuition-free education to children unlawfully present in the United States.

Parties

The parties are the same, in both cases, as in the court below.

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NO 80-1538, 80-1934

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On Appeal From The United States Court of Appeals For The Fifth Circuit

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Brief of Amicus Curiae

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW the Texas Association of School Boards, by and through their attorney of record, John S. Aldridge, and, pursuant to Rule 36 of the Supreme Court Rules of Procedure, offers herewith its Brief of Amicus Curiae in support of Appellants, the State of Texas and the Texas Education Agency:

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, amendment XIV, §2 states in pertinent part,

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Texas Education Code §21.031 states in its entirety:

> §21.031. Admission
>
> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in

which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

(e) A child placed in foster care by an agency of the state or a political subdivision shall be permitted to attend the public free schools in the district in which the foster parents reside free of any charge to the foster parents or the agency. No durational residence requirement may be used to prohibit such a child from fully participating in any activity sponsored by the school district.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards is a non-profit organization whose membership consists of over 1,000 school districts in the State of Texas. Its member schools educate 99% of the total elementary and secondary student population in Texas. Active in efforts to represent and assist local school boards throughout the state, the Association seeks to express the interest of its members.

The overwhelming impact of the two cases at bar, relating to the tuition-free education of illegal aliens, compels the Texas Association of School Boards to voice the interests of its members with arguments supplemental to those of the State of Texas and the Texas Education Agency. The permanent injunction prohibiting appellants from enforcement of Texas Education Code §21.031 is of major concern to Association members because they, not the state or its agencies, are the governing bodies that bear the practical consequences of the decisions in the courts below.

All parties to the case have consented to the filing of this Brief of Amicus Curiae.

SUMMARY OF THE ARGUMENT

Texas has passed a statute that provides a tuition-free education to citizens and legally-admitted aliens, all of whom must be residents of the state. TEX.EDUC.CODE ANN. §21.031 (Vernon Supp. 1980). Citizens, legally admitted aliens, and illegal aliens who are not residents of the state must pay tuition to attend Texas public schools.

Too often Section 21.031 has been read in fragments and out of context. This brief, in its section titled, "Consti-

tutional and Statutory Provisions," quotes the entire statute. Read as a whole, it is clear that Texas' intent was to protect itself from becoming the "forum of choice" for out-of-state parents shopping for a superior school district in which to place their children. Many states have similar provisions.

Texas, however, is different. Instead of being surrounded by contiguous states so that only residents of other states are charged tuition, Texas has an open, thousand-mile border with Mexico and almost a thousand miles of coastline accessible to all of Central and South America and the islands of the Caribbean. Accordingly, local school districts are faced with the costs of educating nonresidents not only from adjoining states but also from other countries. This brief of necessity focuses on the demands of Mexican nationals who have illegally entered this country. It is unfortunate that the issue is now so clouded as to obscure the central principle, that a state may, under established precedent, extend the bounty of its educational system to its legal residents at a tuition different from that charged residents of other states and countries.

The Association respectfully submits that, in the event this Court extends the application of the equal protection clause to illegal aliens, the standard of review should be the rational relationship test.

Neither the nature of the affected right nor the resulting classification dictates the use of the strict scrutiny standard in this case, contrary to the opinion in *In re Alien Children Education Litigation*, 501 F.Supp. 544 (S.D. Tex. 1980), *aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *appeal granted*, 49 U.S.L.W. 3924 (June 16, 1981). The

Fifth Circuit, in *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *prob. juris. noted*, 49 U.S.L.W. 3824 (May 5, 1981), erred in finding no rational relationship between the statute, TEX.EDUC.CODE §21.031, and the state's goal of preserving the adequacy of its public schools for the benefit of its residents.

ARGUMENT

I. Adoption of State's Position

The arguments set forth by the State of Texas are hereby adopted by the Association, particularly on the issue of the applicability of the equal protection clause to undocumented aliens.

II. If the equal protection clause applies to undocumented alien children, the district court in *In re Alien Children Education Litigation* erred in holding that the proper judicial review standard is strict scrutiny.

Assuming for purposes of this argument that the equal protection clause does extend to undocumented alien children, the court in *In re Alien Children Education Litigation* erred in applying the strict scrutiny test, rather than the rational basis test, in reviewing Texas Education Code §21.301.

In any equal protection analysis, a reviewing court must utilize the correct standard of judicial review. If the statute in litigation infringes on a fundamental right or creates an inherently suspect classification, the statute is subjected to strict scrutiny, requiring a compelling state interest to justify it. To discharge such a burden the state must demonstrate that its goal or interest is both constitutionally permissible and substantial, and that its use of

the classification is necessary to the accomplishment of its purpose. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In this case, neither a fundamental right nor suspect classification is at issue. The statute need only meet the rational relationship test. Thus if the statute has a legitimate, reasonable purpose it should be upheld.

A. The statute does not infringe upon a fundamental right.

Education is not classified as a fundamental interest sufficient to invoke strict scrutiny under the equal protection clause. This Court has said: "Education, of course, is not among the rights afforded explicit protection under our federal constitution. Nor do we find any basis for saying that it is implicitly so protected." *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Doe v. Plyler*, 628 F.2d at 463. To continue to argue that education is a fundamental right, after the *Rodriguez* decision, is counter to established legal precedent.

Despite the clarity of this Court's statement that education is not an explicit or implicit constitutional right, the *In re Alien Children* court held that a never-before-recognized "access" to education *is* fundamental. To reach that conclusion, the lower court reasoned that a sufficient nexus exists between education and the freedoms of speech and suffrage. The court stated that the right to an education becomes fundamental when it preserves or is substantially related to other basic civil and political rights guaranteed by the Constitution. 501 F.Supp. at 571. The same argument was considered and rejected by this Court in *Rodriguez*. 411 U.S. at 30-40. The exhaustive analysis of the Court need not be restated; suffice it to say that those arguments were found to be

unpersuasive. More important, the Court treated education as a legislative classification involving economic and social policy not subject to strict judicial review. As such, it was "a particularly inappropriate case in which to subject state action to strict judicial scrutiny." *Rodriguez,* 411 U.S. at 38.

B. The statute does not create an inherently "suspect classification."

While *Rodriguez* conclusively lays to rest any argument that education is a fundamental interest, it also notes the possibility that an education system made available by the State only to those able to pay tuition could create a clearly defined class of "poor" people precluded from receiving an education; such a system might well be subject to strict scrutiny. *San Antonio I.S.D. v. Rodriguez,* 411 U.S. at 24 n. 60.

In any event, all such examinations rely upon the false premise that illegal alien children are absolutely deprived of education. The *In re Alien Children* court, in Note 17 of its opinion, found that 72.9% of the random sample of districts responding to a survey would either require payment of tuition or exclude undocumented alien children. 501 F.Supp. at 555. This statistic misleads because it is based upon only 29 of the more than 1,100 school districts in Texas and because it groups both exclusion and admission with tuition under the same response. Furthermore, it fails to distinguish among school districts according to the number of students they could expect to enroll.

The "class" of poor students is improperly established because the statute requires tuition of *all* out-of-state students, be they Mexican nationals, Germans, Australians,

or even Pennsylvanians, Tennesseans, or Californians. Residency, not poverty, establishes the class. Respondents do a disservice by adopting a stereotype that all Mexican nationals are impoverished supplicants, ignoring that proud country's historical position as the Spanish colonial capital for the development of Central and South America. Americans too often forget that the development of the Northern hemisphere had its counterpart in the Spanish development of the Southern hemisphere and the Southwestern United States.

As recognized by the Fifth Circuit in *Doe v. Plyler*, no "suspect class," namely alienage, is at issue. Mere alienage is not the basis of the statute's classification of those eligible for tuition-free education. The Fifth Circuit correctly concluded that the state of Texas has differentiated between, on the one hand, school age citizens and lawful aliens residing in Texas, and on the other hand, everyone else, which includes aliens illegally residing in Texas and all other persons who are not residents. Aliens as a group are not subjected to tuition.

In a recent opinion, this Court, addressing denial of Medicare supplemental insurance payments to aliens "unless they have been admitted for permanent residence and also have resided in the United States for at least five years," upheld the statute on the rational basis standard, refusing to apply strict scrutiny. The Court found it reasonable to classify persons based on some durational residency requirement, at the minimum.

> "But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally

> entitled to benefits, *some* durational requirement would certainly be appropriate."

Mathews v. Diaz, 426 U.S. 67, 82 (1976). Strict scrutiny is not the proper judicial review standard to be applied in the case at bar.

III. The statute is reasonably related to a legitimate government purpose.

If the equal protection clause applies to undocumented alien children, the state has shown that the classification rationally furthers the state's purpose in enacting the statute. The Fifth Circuit opinion in *Doe v. Plyler* virtually ignored not only the reasons for promulgating the statute but also the fact that the rational basis test presumes a statutory classification to be constitutional. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)(per curiam). Traditionally, if a statutory classification is rationally related to a legitimate governmental function, it will probably be sustained. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Fifth Circuit erred in finding no rational relationship in this case.

A major reason for the statute's existence has become more apparent in recent years with the influx of illegal aliens into this country. The state legislature recognized the quandary of local school districts contending with, on the one hand, inflation, employee demands for higher salaries, and overall increased costs, and on the other hand, failure of school bond elections, demands for high standards, and insistence upon better schools. Perplexed by a combination of all these factors, local schools have borne the brunt of the criticism of public education.

Among the efforts to help maintain adequate schools without adversely affecting the state's residents was the measure now known as Education Code §21.031. To be sure, one state interest in the statute is a monetary one. The state and local boards are attempting to preserve an adequate school system for its residents in the least burdensome manner possible—by charging tuition to those students who are nonresidents, and who, in many cases, have no intention of remaining in this country.

The right for a state government to establish reasonable criteria for state residency status for tuition purposes has been recognized by this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973). *Vlandis* established the permissibility of preventing students who were not bona fide residents of a state, but who resided there solely for educational purposes, from taking advantage of in-state rates. This Court in *Vlandis* defined residence as "... the domicile of an individual [which] is his true, fixed, and permanent home and place of habitation. It is the place to which whenever he is absent, he has the intention of returning." 412 U.S. at 454.

We all recognize that the state has a limited amount of funds available for education for its citizens and under *Vlandis* can set reasonable tuition requirements for nonresidents. We also recognize, under the authority of *Mathews v. Diaz*, that the equal protection clause allows reasonable restrictions related to whether an alien is a permanent resident:

> [S]urely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, *some* durational require-

> ments would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. . . . [N]either requirement is wholly irrational. . . . We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not qualify.

426 U.S. at 83-84.

Examined objectively, the statute in its present form extends an education to all students residing in the state. The district court in *In re Alien Children* found that only 10% of the undocumented persons in this country remain here as permanent residents. School districts recognize the need to educate the children of those intending to remain and become citizens. However, the state has a right to make reasonable distinctions so as not to assume educational costs of the approximately 90% of the illegal aliens who do not intend to remain in this country. It is undisputed that the overwhelming majority of illegal aliens in Texas are here for limited employment purposes with the intent of returning to their home countries. Under *Vlandis*, requiring such nonresidents to pay tuition is a permissible state action.

The statute does not prohibit school districts from enrolling the illegal alien children but simply withholds state funding for those students. Local schools are free to accept illegal aliens under the statute, with or without tuition. The Dallas Independent School District, for example, now faces enrollment of between 2,000 and 5,000 illegal alien children from Mexico. *Doe v. Wright*, No. 80-2017 (5th Cir. June 5, 1981) (per curiam)(special concurrence). Outlying districts, however, have for several years enrolled the students because their small numbers do not pose serious local difficulties to their generally financially stable school districts.

In an attempt to give the widest possible reading of what constitutes a "resident" or a legally admitted alien, the state prepared a proposed amendment to its State Board of Education Administrative Procedures, Administrative Procedure 51.01, *Student attendance allowed.* That policy lists a number of recognized immigration forms that aliens may possess and states that "any other document recognized by the United States Government," is acceptable. The form concludes that ". . . nothing herein shall prohibit any local school district from accepting any student on a basis of tuition charges *or costs paid by the local district*" (emphasis added). These proposed procedures were sent to all school districts on March 6, 1980 by Alton Bowen, Commissioner of Education. Those aliens who have complied with minimal federal guidelines, even though entering illegally, seeking federal protection under the "Silva letters," are thus subject to state funding under the guidelines set forth by the Commissioner of Education. It is actually a very small percentage of alien entrants who, in the language of this Court, cannot advance "even a colorable constitutional claim to a share in the bounty that a conscientious sover-

eign makes available to its own citizens and *some* of its guests." *Mathews v. Diaz*, 427 U.S. at 80.

Besides having a statewide effect, the courts' invalidation of the statute presents a problem of another sort, albeit related to fiscal implications, to local schools. Even with state funding for educating local children, school districts are seriously strained, particularly in the area of bilingual education. Already the state is under federal court order to dramatically upgrade bilingual education facilities. In *United States v. Texas*, 506 F.Supp. 405 (E.D. Texas, 1981), a massive bilingual program for grades kindergarten through twelve was ordered because of the finding that "the state's existing bilingual program, while an improvement over past practices, is wholly inadequate." 506 F.Supp. at 428. This ruling came after considering only the problems in educating Texas residents with limited English proficiency. By the year 1987, by court order, "each student entitled to bilingual instruction will be provided a program of such instruction in all regularly offered academic subjects or subject areas with the exception of art, music, physical education ..." *United States v. Texas*, No. 5281, slip op. at 3 (E.D.Tex. April 17, 1981). Adding children in need of even more intensive bilingual programming to the overall educational system will undoubtedly create an even greater shortage of qualified bilingual teachers and appropriate materials.

The main justification for the statute revolves around fiscal considerations, both state and local. The court in *Doe* stated that cost could not justify the exclusion of any group of people from any government program that requires funding. 628 F.2d at 459. The special concurrence in *Boe v. Wright* states that the *Doe* "panel's state-

ment is too broad. Cost of a government funded program is a legitimate governmental interest. A challenged classification will be sustained if it rationally furthers such a legitimate governmental interest." *Boe v. Wright*, slip op. at 2 (special concurrence).

The cases cited in *Doe v. Plyler* do not stand for this proposition in the context of a rational relationship review under the equal protection analysis. For example, *United States Department of Agriculture v. Moreno* involved not fiscal considerations but rather a statute whose legislative history indicated that the legislative desire was to purposefully discriminate against an unpopular group, "hippies." Independent, legitimate government interests were notably absent.

In the other two cases cited in *Doe* for the conclusion that cost cannot be a rational reason for a classification, the Court was applying a strict scrutiny test, inappropriate in a rational basis analysis. As distinguished in the special concurrence in the Fifth Circuit's *Boe v. Wright* opinion:

> In *Graham* [*v. Richardson*, 403 U.S. 365 (1971)], the Court held that the states had a legitimate governmental interest in preserving the fiscal integrity of their welfare programs and that they can legitimately attempt to limit expenditures on these programs. But the Court held that the states cannot accomplish such a purpose by invidious discrimination because the challenged classifications (excluding lawfully admitted resident aliens from welfare assistance) were inherently suspect. 403 U.S. at 371-76.

> In *Shapiro* [*v. Thompson*, 394 U.S. 618 (1969)], the Supreme Court applied the compelling state interest test and held unconstitutional a state classification that imposed a one-year waiting period before new residents could become eligible for public welfare assistance. The Court recognized that a state has a legitimate interest in attempting to limit its expenditures on welfare assistance, but that the state's classification was invidious because it impinged on the fundamental right of interstate travel without promoting a compelling state interest. 394 U.S. at 633, 638 . . . . Therefore, it is clear that cost, in and of itself, can justify a classification if a rational basis exists for it — assuming that no constitutionally impermissible state objective exists.

Boe v. Wright, slip op. at n.3.

Asserting that Texas should have attacked the illegal alien problem by passing a statute that would prohibit employment of illegal aliens, the *Doe* panel substituted its judgment for that of the state legislature. The "exclusionary motive," i.e., discouraging illegal immigration to this state by denying free education to illegal aliens, was attacked in *Doe* because of the state's failure to enact such an employment statute. Clearly, sitting as a "superlegislature" is inappropriate for a federal court. The state may have overlooked one remedy or many remedies, but its failure or inability to ameliorate all perceived evils does not per se invalidate its permissible and reasonable legislative actions. *City of New Orleans v. Dukes*. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determina-

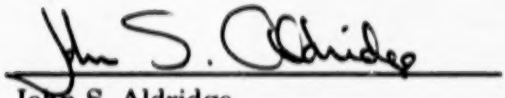
tions made in areas that neither affect fundamental rights nor proceed along suspect lines." 427 U.S. at 304.

No fundamental right is affected and no suspect class is involved. The state has demonstrated ample basis to determine that there is a rational reason for its decision to exclude undocumented aliens from tuition-free state-funded education. The state's police power includes the authority to regulate employment, health and safety, and education. It maintains a significant interest in the welfare of its own residents; in keeping with that interest, the state must preserve, as best it can, the quality of education for its students. This Court has shown in *DeCanas v. Bica,* 424 U.S. 351 (1976), that a state's regulation "of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation." 424 U.S. at 357. The Court pointed to both protection of a lawfully resident labor force and fiscal considerations as adequate justifications for a statute prohibiting employment of illegal aliens. At this time, it is necessary for the state of Texas to regulate education in areas where education of all illegal immigrants would have an adverse impact both on the education of lawful resident children and fiscal funding.

CONCLUSION

For the foregoing reasons, the Texas Association of School Boards respectfully requests reversal of the rulings below. In addition, it requests an order to vacate the trial courts' permanent injunctions against implementation of Texas Education Code 21.031 (a)-(c).

Dated July 30, 1981 and respectfully submitted,



John S. Aldridge
Texas Association of School Boards
P. O. Box 400
Austin, Texas 78767
512/476-9116

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NOS. 80-1538 and 80-1934

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SUPREME COURT OF THE UNITED STATES
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Appellants,

v.

J. and R. DOE, as guardian ad litem
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Appellees.

IN RE: ALIEN CHILDREN EDUCATION
LITIGATION STATE OF TEXAS
AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee,
and
CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From The United States
Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF TEXAS IMPACT IN SUPPORT OF APPELLEES

FRED FUCHS
BARBARA HINES

Attorneys for Amicus Curiae

900 Perry Brooks Building
Eighth on Brazos Streets
Austin, Texas 78701
(512) 476-7244

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On Appeal From the United States Court of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF TEXAS IMPACT, SUPPORTING APPELLEES

INTEREST OF AMICUS CURIAE

Amicus curiae, Texas IMPACT, is the state level organization of National IMPACT, a non-profit interreligious network sponsored by Protestant, Roman Catholic and Jewish bodies and composed of individual members from the religious community. Texas IMPACT works closely with the Texas Conference of Churches and other religious groups in Texas to provide a presence of religious social consciousness in state government.

Concern of the religious community for the important issue presented in this litigation stems from the Judeo-Christian scriptural record's recurring theme of insistence that the people of God have a special responsibility to the sojourners in their midst. See Exodus 23:9; Leviticus 19:34; Jeremiah 22:3; Zechariah 7:8-10; Isaiah 61:1-2; Luke 4:18-19.

In the fall of 1980, the Texas IMPACT Board of Directors, convinced that education and literacy are critical to personal growth, economic and social development and religious expression, established the education of undocumented children as its first priority in the 1981 Session of the Texas Legislature.

Since that time, Texas IMPACT has undertaken a number of projects to address this very important public policy question. The organization has closely monitored implementation of the statewide injunction entered in July of 1980. Texas IMPACT has also worked closely with legislators and other concerned groups and individuals seeking to repeal the challenged statute in the last legislative session and has sought to educate the religious community on this vital issue. This educational effort included publication of a 25 page informational

booklet, "Por los Ninos, Education for Undocumented Children", which was widely used in churches as a resource for study by both groups and individuals.

As amicus curiae, Texas IMPACT seeks to bring before this Court information of public record relating to the numbers and effect of the undocumented children enrolled in Texas schools in the 1980-1981 school year. Texas IMPACT also seeks to communicate to this Court the fruits of its extensive deliberations on the important public policy questions at issue in this case.

All parties to the case have consented to the filing of this Brief of amicus curiae.

SUMMARY OF ARGUMENT

Whether formulated as an important liberty interest protected by the due process clause, as a right contained in the penumbras to fundamental civil

liberties previously vindicated by this Court, or as a fundamental interest deserving of heightened scrutiny under equal protection analysis, access to primary education, the provision of which "ranks at the very apex of the function of the state" Wisconsin v. Yoder, 406 U.S. 205, 213 (1972), surely is a fundamental right deserving of this Court's continued solicitude.

An examination of the State's interests which have been advanced in support of the constitutionality of Section 21.031 of the Texas Education Code, which deprives an identifiable class of poor children residing in Texas access to public education, requires a ruling that the statute does not serve a "compelling state interest" nor does it even meet the less stringent "rational basis" test.

The irrationality of Section 21.031

is evidenced by information of public record documenting the numbers, distribution and effect of the undocumented students who enrolled in Texas schools in the fall of 1980 pursuant to the statewide injunction. These records demonstrate that no school district could show sufficient harm to secure a stay of the judgment from a district court, a recourse specifically delineated by Justice Powell in the order vacating the stay of judgment instituted by the court of appeals. Only one local school district even sought such relief.

Data maintained by the Texas Education Agency also reveals that less than 11,000 undocumented students enrolled in Texas schools in the 1980-81 school year, a figure constituting less than one-half of one percent of total student enrollment in Texas and comprising less than ten percent of the estimate of 120,000

undocumented school age children argued by Texas in lower courts. The State's own public records have documented that enrollment of undocumented children has had no fiscal effect on state or local governments. Texas fiscal resources, particularly those earmarked for education, have, in fact, enjoyed unprecedented growth, even since entry of the statewide injunction, so that today the State's Permanent School Fund is the largest education endowment in the world.

Denying access to education impermissibly punishes innocent children for a status over which they have no control and has no discernible effect on illegal migration. Providing education to undocumented children, who share characteristics similar if not identical to other alien and citizen students, will not reduce the quality of education available to all students, and is inconsistent with

this Court's ruling in San Antonio v. Rodriguez, 411 U.S. 1 (1973). In those urban school districts with declining enrollments, the presence of undocumented students, whose enrollment generates more state aid for the school districts, may actually enhance the ability of local districts to improve the quality of education to all students.

Although the undisputed evidence presented in this litigation confirms that the great majority of undocumented children are here to stay and will become permanent residents, providing children access to primary education should not be conditioned on future residence, future employment, or future participation in the political process. Universal literacy is an important international human rights goal, recognized in numerous international human rights instruments. Providing children the

opportunity to learn the basic literary skills necessary for survival in the modern world is of transcendent importance.

ARGUMENT

I. ACCESS TO PRIMARY EDUCATION IS A FUNDAMENTAL RIGHT.

It is undisputed that the children in this litigation are protected by the due process clause of the fourteenth amendment. Mathews v. Diaz, 426 U.S. 67 (1976); Wong Wing v. United States, 163 U.S. 228 (1896).

The due process clause protects those liberties that are "so rooted in the tradition and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Among those liberties recognized by this Court as entitled to protection under the fourteenth amendment are rights "to acquire useful knowledge,

to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience." Meyer v. Nebraska, 262 U.S. 390 (1923) and "the liberty of parents...to direct the upbringing and education of children." Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

In Griswold v. Connecticut, 381 U.S. 479 (1965), this Court, speaking through Justice Douglas, recognized a fundamental right to privacy. Although acknowledging that the right is not specifically mentioned in the Constitution, the Court reasoned that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. Thus, just as the right of association, a right not expressly included in the Bill of Rights, is necessary in making the first amendment

guarantee meaningful, NAACP v. Alabama, 357 U.S. 449 (1958), the Griswold Court held that the right of privacy is contained in the penumbras of the first, third, fourth, and fifth amendments, and its existence is further recognized by the ninth amendment. 381 U.S. at 483-85.

As recognized by this Court in Griswold and Roe v. Wade, 410 U.S. 113 (1973), those fundamental personal rights not specifically mentioned in the Constitution but deserving of protection include rights necessary to the exercise of first amendment rights--right to association, right to utter or print, right to distribute, right to receive information, right to read, freedom of thought, right of belief, right to express one's attitudes or philosophies, Griswold, 381 U.S. at 483,--and fundamental rights included in the guarantee of personal

privacy particularly relating to rights inherent in family relationships (marriage, procreation, contraception, abortion, family relations, child rearing and education). See Roe v. Wade, 410 U.S. 113 (1973).

Whether formulated as an important liberty interest protected by the due process clause, as a right contained in the penumbras to fundamental civil liberties previously vindicated by this Court, or as a fundamental interest deserving of heightened scrutiny under equal protection analysis, access to primary education, which is universally recognized as essential to a child's acquisition of basic literacy skills, surely ranks among those fundamental rights deserving of this Court's continued solicitude.

There can be little question that literacy and mastery of basic educational skills are necessary in making explicit

constitutional guarantees meaningful to the individual. Literacy is essential to give "life and substance" to first amendment freedoms and vindication to fundamental rights inherent in establishing a home, directing the upbringing and education of children, exercising religious freedom, participating in democratic self government and earning a living in a modern industrial economy.

A compelling argument for recognition of a fundamental right to primary education is the status granted this right by the states.

In Texas, education is a constitutional right. The Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable

provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, §1 (1869).

As Justice Seals observed in In re Alien Education Litigation, 501 F.Supp. 544 (S.D. Tex. 1980):

> The Constitution of 1869...required for the first time a uniform system of public free schools for the gratuitous instruction of all inhabitants between the ages of six and eighteen with compulsory attendance and a highly centralized system of school administration. In 1884, with the enactment of the school law, the idea of universal public education became completely accepted in Texas.
>
> Current statutory provisions reflect the State's control of education. One need only cite the compulsory attendance law, to illustrate the State's involvement in education. The State's ability to compel attendance reflects the social recognition of the governmental interest in educating all persons within the jurisdiction.
>
> Other areas which may be occupied by state activity do not share

> with education the connection to the essence of government...

Id. at 563 (citations omitted).

The traditional police power retained and exercised by the state to promote the health, welfare, safety and common good is perhaps nowhere more evident than in state legislation to protect and safeguard children, and "[p]roviding public schools ranks at the very apex of the function of the state." Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). As this Court stated in Prince v. Massachusetts, 321 U.S. 158 (1944):

> Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways...The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance upon the healthy, well rounded growth of young

> people into full maturity as citizens with all that implies...

Id. at 166, 168 (emphasis added).

Even when this Court has invalidated a state's assertion of its power to compel compulsory school attendance because of conflicts with other fundamental liberties protected by the Constitution, the Court has closely scrutinized the extent to which invalidation of the state's school attendance requirements would affect the child's opportunity to acquire essential skills. In Wisconsin v. Yoder the Court ruled that Amish children could be exempted from compulsory high school attendance because the state regulation conflicted with the Amish right to free exercise of religion protected by the first amendment. The Court was assured, however, that children received training in essential skills: "Since the Amish children are permitted to acquire the

basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory education law is relatively slight, I conclude that respondents' claim must prevail..." 406 U.S. at 238 (White, J., concurring).

In Pierce v. Society of Sisters, supra, the Court invalidated a state statute requiring compulsory education in public schools, holding that the statute unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. Here again, however, the Court carefully observed that invalidation of the statute

would not affect state legislation requiring compulsory school attendance and private schools would be state accredited, thus maintaining basic educational standards insuring opportunity for acquisition of basic skills. Id. at 534.

Neither a parent's liberty interest in directing the upbringing and education of children nor the parent or child's first amendment right to religious worship will override the state's interest in exercising its inherent police power to protect and safeguard the child if the exercise of these liberties threaten the welfare of the child.

In Mitchell v. Davis, 205 S.W.2d 812 (Tex. Ct. Civ. App.--Dallas 1947, writ ref'd), the Texas Court of Civil Appeals, rejecting a parent's assertion of a right to withhold medical treatment from her child on religious grounds, stated as follows:

> Medicines, medical treatment and attention, are in a like category with food, clothing, lodging and education as necessaries from parent to child, for which the former is held legally responsible. 23 Tex. Jur. 719; and proof that the parent is failing to provide any of these legal necessities to minor constituents of the family would in our opinion, sustain a charge of parental neglect. "It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the State, under its police powers, may prevent."

Id. at 813-14 (emphasis added).

Clearly parents have a legal right and duty to nurture, care for, and educate their children. Parents of the children in the instant case will be prohibited from fulfilling these important legal and moral obligations if the challenged statute is held constitutional. It is of critical importance, not

only to the parents and children but also to the State of Texas, that the children receive access to primary education. As this Court stated in Pierce v. Society of Sisters, 268 U.S. 510, 519, "it vitally interests and concerns the state that children shall be furnished the means of education and not left to grow up in ignorance."

The states' legitimate interest in providing educational opportunities to its children has been of no little interest to this Court. This Court has consistently recognized the importance of education both to the individual and society. In holding that education is an important property and liberty interest protected by the fourteenth amendment, the Court has not hesitated to invalidate state actions which arbitrarily or unreasonably infringe on this protected interest. See, e.g., Goss v. Lopez,

419 U.S. 565 (1975); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Brown v. Board of Education, 347 U.S. 483 (1954); West Virginia v. Barnette, 319 U.S. 624 (1943).

The proper inquiry in the instant case is whether the challenged statute, which indisputably and absolutely deprives an identifiable class of poor children residing in Texas access to public education, is narrowly drawn to serve a "compelling state interest." Roe v. Wade, supra; Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).

An examination of the state interests involved in this litigation, discussed infra, requires a ruling that the statute does not serve a "compelling state interest" and, in fact, reveals a startling lack of any reasonable justification. The statute therefore must be

invalidated as not even meeting the less stringent "rational basis" test.

II. SECTION 21.031 IS NOT NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST, NOR IS IT SUPPORTED BY A RATIONAL BASIS.

The State of Texas, while conceding the harsh results of the challenged statute, has consistently argued throughout the litigation that the primary rational basis for Section 21.031 was preservation of scarce resources and fiscal integrity.

While admitting that "no studies were conducted [prior to the amendment] to determine the number of undocumented children throughout the State or the fiscal impact of educating them", In re Alien Children, 501 F.Supp. at 574,[1/] the State has argued in the lower courts

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1/ None of the parties to this litigation nor the district courts uncovered a shred of legislative history for Section

that as many as 120,000 undocumented children are residing in Texas; that their enrollment would present substantial fiscal burdens on state and local governments; and that excluding the children from public schools was reasonable and justified to preserve scarce educational resources.

This Court should recognize the public records which have become available documenting the numbers, distribution and effect of the undocumented

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1/ (Cont.)
21.031. The author of the Senate bill introducing the amendment has stated that he cannot remember why he sponsored the legislation. Fort Worth Star-Telegram, May 16, 1981, at 31, col. _. Another state senator said it "was worded affirmatively so I doubt I would have noticed it kept people out of school." Id. It has been suggested that most legislators were unaware that children would be excluded from school. As one senator stated, "It was late in the session and there was great concern that work would not be completed on a school finance bill before the end of the session." Id.

students who enrolled in Texas schools during the 1980-81 school year pursuant to the statewide injunction. 2/

These records demonstrate that no local school district has been severely hampered in providing education to all students in the 1980-81 school year and that enrollment of undocumented students has had de minimis effect on fiscal resources.

Additional interests advanced by the State in support of the statute are that educating these children will be an inducement to illegal immigration by

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2/ Rule 201(b)(2) of the Federal Rules of Evidence authorizes judicial notice of "adjudicative facts...capable of accurate and ready determination by resort to sources whose accuracy cannot readily be questioned." All facts relating to the numbers and distribution of undocumented alien students enrolled in the 1980-81 school year are maintained by the State of Texas and noticeable under the rule. See 21C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§5101-5111 (1977).

attracting Mexican children to come to Texas to be educated; the inclusion of the children will dilute services to "legal" alien students and citizen students; and that educating undocumented alien children is not necessary or required because the children cannot be citizens or participate in the political process. Each of the State's arguments in support of the statute is without merit.

A. No Local School District Has Been Severely Hampered in Providing Education to all Students in the 1980-81 School Year.

On September 4, 1980, Justice Powell vacated the stay of judgment instituted by the court of appeals. Certain Named and Unnamed Non-Citizen Children and Their Parents v. State of Texas, 448 U.S. 1327 (1980). However, the order did provide a recourse for individual school districts:

> This order shall be without prejudice to the ability of an individual school district, or the State on its behalf to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely hamper the provision of education to all its students during the coming year, the granting of a stay would be justified."

Id. at 1334.

Subsequently, only one local school district of the 1,080 school districts in Texas applied to a district court for a stay, and in that case the district court denied the relief requested by the local school district. The district court found that "the Brownsville I.S.D. will not suffer irreparable harm from the admission of these children. It must be kept in mind that the undocumented children are not the sole cause or even the major cause of the [district's] problem."

Brownsville Independent School District v. Certain Named and Unnamed Undocumented Alien Children. No. B-80-234, slip op. at 9 (S.D. Tex. Jan. 14, 1981).

The fact that no school district could demonstrate sufficient harm to stay the judgment -- and that only one school district even sought such relief -- is compelling evidence of the insignificant burden on local school districts caused by the enrollment of these children.

B. Enrollment of Undocumented Students has had de minimis Fiscal Effect.

The negligible effect of undocumented students on Texas school districts is also evident from the records of 1980-81 enrollment of undocumented students maintained by the State of Texas and Texas Education Agency (TEA).

These records reveal that after the children were allowed to enroll in Texas public schools in September, 1980, the

State, through its Attorney General Mark White, communicated to all school districts in the State of Texas asking each to enroll all children and complete a survey form on the numbers and distribution of undocumented alien children.[3/]

The survey data collected by TEA was analyzed by Inter Cultural Development Association (IDRA) which recently published its study, Distribution of Undocumented Pupils in Texas Public Schools: A First Look.[4/]

The State's survey of local school districts revealed that 10,927 undocu-

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3/ See letter of Mark White to Texas School Administrators and TEA Form used in Survey of Undocumented Students, Appendix B at B22-25.

4/ The study is attached as Appendix B. Copies of all completed survey forms are attached as exhibits to the deposition of Alton O. Bowen, Commissioner of Education, State of Texas, taken November 20, 1980. Amicus understands the deposition is on file in the district court in In re Alien Children Education Litigation.

mented alien students, representing less than one-half of one percent of the total Average Daily Attendance (ADA) in Texas, enrolled in Texas public schools in the fall of 1980. This number is but a fraction of the 120,000 figure contended by Texas in In re Alien Children.

Even more noteworthy perhaps is that only 332 of the 1,080 Texas school systems reported the presence of any undocumented students.[5/] Furthermore, of the 332 districts reporting undocumented students, 204 (61%) reported having 10 or fewer undocumented children enrolled and only 13 school districts reported counts in excess of 100 pupils. Not surprisingly the major urban/surburban school districts, which have the greatest public enrollment in the State also had the

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5/ Appendix B at B6, B26.

highest enrollment of undocumented students.

IDRA examined in more detail the characteristics of districts reporting relatively high counts of undocumented children (over 50).[6/] The analysis revealed that 17 of the 37 "high count" districts, with a combined undocumented student enrollment of 5,721, had experienced declining enrollments. Significantly, the decline in enrollment of these large districts, totalling 18,702 in the 79-80 school year and 58,005 over the past five years, was substantially greater than the number of undocumented students (5,721) enrolled in the same districts in the 1980-1981 school year.[7/]

Indeed, the data seems to indicate that the integrity of local school

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6/ Id. at B9, B28-29.

7/ Id. at B11, B34-37.

districts, which have been experiencing enrollment declines, was enhanced by the addition of undocumented students. The influx of undocumented children enabled some school districts to retain state aid, which in large measure is based on the district's ADA, and thereby stave off increased local contributions to support education programs.[8/]

This ironic effect of excluding undocumented children was discussed by the district court in Doe v. Plyler, 458 F.Supp. at 577:

> The connection between the "economy measure" of excluding undocumented children from the benefits of the Available School Fund and increasing educational quality for the remaining students as shown to be unrealiable, and often perverse in operation. Educational funds in Texas come from state, local and federal sources. A local district's allotment from state funds depends in part on its Average

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8/ Id. at B12-13, B28-29.

> Daily Attendance ("ADA"). Prior to the enactment of Section 21.031 in 1975, a district could include undocumented children in its ADA and receive state funds accordingly. Under Section 21.031, however, a district is required to exclude undocumented children from its ADA, decreasing the amount of state funds it receives. Meanwhile, the diminished enrollment, by reason of the factors described above, is unlikely to have resulted in any savings to the local district. The school district is then forced to choose between increasing its own contribution, so as to maintain the current level of expenditures, or cutting back on its programs. Although the State will have saved money, it will not necessarily have improved the quality of education.

If Section 21.031 were found constitutional by this Court and large urban districts with declining enrollments were forced to exclude these children, the result could well be reduction in the amount of state aid to these local districts, without any corresponding reduction in the amount of local monies needed to maintain their programs. The ironic result would be reduction of educational

resources available to educate the remaining legal alien and citizen students.

IDRA's analysis of the TEA survey data also revealed the existence of school systems that have experienced increases in enrollment over preceding years. In these districts it is possible that undocumented students do contribute to problems associated with growth. It is illogical, however, to blame the undocumented student population for enrollment increases. These districts have had a history of growth in enrollment and thus have (or should have) extensive experience in dealing with the issue. Moreover, in these districts undocumented student counts were significantly lower than the enrollment increases experienced in previous years.

One school district with a history of growth in enrollment was examined by

the district court in Brownsville I.S.D., and the court concluded:

> Brownsville I.S.D. has certainly shown that it faces serious problems in providing an educational opportunity for all children in the district, but it has not shown that it is exclusively the result of the admission of the undocumented alien children into the school system. The district underestimated the peak enrollment for the current year. Even excluding the addition of the undocumented alien children, the school district's projection was at least 1,000 children short of what the actual enrollment would be. Thus, the problem of overcrowding and the unexpected financial burden would have been with the district in any case....

Brownsville I.S.D., supra, slip op. at 8.

In hearings before committees of the 67th Session of the Texas Legislature which considered proposals to repeal the challenged provisions of the Texas Education Code, testimony on the numbers and distribution of undocumented children was introduced as was testimony from local

school officials on the negligible effect on local districts of the inclusion of the undocumented children.[9/]

As indicated in the bill analysis of the House Committee Report of House Bill No. 467,[10/] those testifying in favor of the bill included Robby Collins, speaking on behalf of Dallas Independent School District, and Ruby Clifton, speaking on behalf of Houston Independent School District. Although these two school districts, the two largest school districts in the state, had vigorously opposed admitting these children in district court hearings, their position on

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9/ The House Committee Report of House Bill 467, issued April 28, 1981, is reproduced in Appendix A. Although both house and senate committees and the full house of representatives of the State of Texas voted in support of the proposal, the bill did not reach the senate floor and was not enacted into law.

10/ Appendix A at A7.

the issue changed after the children enrolled in school in the fall of 1980. Each testified that the additional enrollment was much less than anticipated and that the undocumented students posed no significant burden on the districts.[11/]

Most significant was the fiscal note provided the House Committee on Public Education by the Legislative Budget Board. The Legislative Budget Board, through its director and on the basis of information supplied by the Texas Education Agency, responded to the House Committee's request for a statement on the fiscal implications of House Bill 467 as follows:

11/ Testimony on House Bill 467, 67th Legislative Session, before House Committee on Public Education, April 7, 1981.

> No fiscal implication or additional cost to the State or units of local government attributable to the bill, should it be enacted is anticipated.12/

Thus, once again, the State declares unequivocally that educating these children poses no fiscal burden on the State of Texas.

Lower courts have observed that Texas enjoys a healthy economy. Indeed, counsel for the State of Texas made this clear to the district court when she stated in closing argument in In re Alien Children,

> There is no place in this pre-trial order that the State has said the State of Texas doesn't have enough money. Not one place. Texas can come up with the money. If we want to get the legislature to fund certain projects we will go down and get them to fund it. The State never said it didn't have money in its budget.

501 F. Supp. at 579.

12/ Appendix A at A9.

Texas education resources, in fact, have enjoyed unprecedented growth, even since entry of the statewide injunction. Texas Land Commissioner Bob Armstrong announced September 17, 1981, that the Permanent School Fund had exceeded three billion dollars, up from one billion dollars in 1971, with the recent delivery of a 1.2 million dollar royalty check. Austin American-Statesman, September 18, 1981, at B8, col. 1. Due to rapid escalation in oil and gas prices and aggressive leasing policies, the Permanent School Fund is now the "largest education endowment in the world." Id.

Armstrong said that despite recent moderation of oil prices, "all we're seeing is escalation" in the amount of royalty payments, adding that the fund is collecting about 460 million dollars a year now and will soon increase to 500 million dollars a year. Id.

The foregoing unquestionably substantiates that educating these children in the 1980-81 school year has not imposed any discernible fiscal burden on the State of Texas. Clearly the primary purported basis of the State -- to preserve fiscal resources -- is without merit.

C. Denying Access to Education Punishes Innocent Children For a Status Over Which They Have no Control and Has no Discernible Effect on Illegal Migration.

Texas has apparently concluded that by depriving these children of an education, the children will either be motivated to return to Mexico or be deterred from coming in the first place.[13/] In

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13/ The State argues: "Texas should not be forced to open its schools to the indeterminate number of Mexican children who may cross the border seeking education and family unity." Brief for Texas at 31. (This citation is to the State's unprinted brief filed with the Court August 29, 1981.)

either event, Texas has determined that those who remain in Texas will suffer the most severe punishment the State can exact on children: they will be deprived of an education.

This purported "rational basis" for Section 21.031 - that providing education is an inducement to illegal immigration - rests on the most specious of reasoning. First, it rests on the State's totally unsupported speculation of future harm if all children are educated in Texas.[14/]

This Court should not countenance the State's request for speculative relief. As this Court has stated, "the law deals in reality, not obscurity - the known rather than the unknown...The law does not deal in speculation." Roe

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14/ As discussed, supra, the State cannot argue injury in the present; educating the children in 1980-81 presented no discernible effect on State or local resources.

v. Wade, 410 U.S. at 217-18 (Douglas, J., concurring), quoting Justice Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyala U. (L.A.) L. Rev. 1, 9-10 (1969).

Second, such an argument assumes that a significant number of aliens enter Texas for the express purpose of getting an education in Texas schools, an assumption lacking any support in the facts. The undisputed primary reason undocumented aliens enter the U.S. is to seek employment, and the overwhelming percentage of those who come are single males who remain in Texas but a short time. That there is an undocumented population in Texas at all simply attests to the fact that undocumented aliens can easily find employment in this State.[15/] The par-

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15/ It should be noted that undocumented alien workers contribute their proportional share to taxes which support

ties' migration experts testifying in district court agreed that those families who enter with children constitute a very small percentage of the undocumented population and constitute a subgroup of undocumented aliens who are permanent settlers that remain in Texas. See In re Alien Children, 501 F. Supp. at 558-59.

Further evidence that tuition free education is not an inducement to immigration is that, as previously discussed, over 10,000 undocumented children in Texas were enrolled in Texas schools in the fall of 1980. If the State's argument had any basis in fact or reason one would have expected these

15/ (Cont.)
public education. Texas Comptroller Bob Bullock has stated "Illegal aliens have been paying sales tax, motor vehicle tax and gasoline tax just like Texas residents. Some may treat them as second class citizens, but they are first-class taxpayers." Austin-American Statesman July 24, 1980, at _____, col._____.

children to have sought an education elsewhere.16/

The State's argument presumes that Mexican children make the decision to enter or leave this country. This is clearly not the case. Children do not and cannot choose their residence. Under Texas law children are under the actual and legal control of their parents. TEX. FAM. CODE ANN. §12.041 (1),(2) (Vernon Supp. 1980). See also discussion, supra, at 13-20.

The actual purpose and effect of the statute then is to punish these children for a status over which they have no

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16/ Amicus note that if education were an inducement to illegal migration, knowledgeable Mexican parents would hardly choose Texas over other States of the Union to educate their children. Texas ranks forty-second of the fifty states in current per pupil expenditure. In re Alien Children, 501 F. Supp. at 580. In addition, Texas has been severely criticized for its inadequate education pro-

control. The statute "completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted." Bridges v. Wixon, 326 U.S. 135, 163 (1945) (Murphy, J., concurring). Justice Murphy described the doctrine as follows:

> The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. It prevents the persecution of the innocent for the beliefs and actions of others.

Id. (citations omitted).

16/ (Cont.)

grams for bi-lingual Hispanic children. See United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981).

Lower courts ruling on this issue appropriately relied on the doctrine as reflected and reaffirmed in decisions of this Court refusing to penalize and stigmatize children who are not in a position to prevent the wrongful acts of their parents. See, e.g., Weber v. Aetna Casualty and Surety Company, 406 U.S. 165 (1972); St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

D. Educating Appellee Children Who Share Characteristics Similar If Not Identical to 'Legal' Alien and Citizen Students Will Not Reduce the Quality of Education Available to All Students.

The State's argument that educating the children will dilute educational services available to 'legal' alien and citizen students, rests on the presumption that undocumented children require a disproportionate share of educational resources because of their characteristics.

The district court in Doe v. Plyler found that "[n]o convincing testimony was presented...that singled out undocumented children as particularly problematic. The characteristics of legally admitted, Mexican-born children, as a class, are very similar, if not identical, to those of undocumented Mexican-born children." 458 F. Supp. at 576. In fact, the district court stated that each of the plaintiff children had at least one United States citizen sibling who would be clearly eligible to attend public schools, suggesting that characteristics of undocumented children are very similar if not identical to an identifiable group of United States citizen children.[17/]

17/ If some children admitted to Texas schools in 1980 are "over age and over size" because they were not

Further, as Judge Seals observed in In re Alien Children, "[t]here is no data which show that the academic performance of students has improved since undocumented children were excluded." 501 F. Supp. at 574.

The State's "dilution" argument further rests on the discredited presumption that there is a demonstrable correlation between cost per pupil and the quality of education. This Court, at the urging of the State of Texas, specifically rejected the proposition that quality of education is

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17/ (Cont.)

allowed to attend schools in previous years, the State has no one but itself to blame. It is clearly untenable that the State be allowed to inflict severe injury on a particular group of disadvantaged children and then be heard to argue that remedying the problem, which it alone has caused, will be so difficult that the only solution is to inflict even more injury on more children.

affected by relative discrepancies in educational funding in San Antonio School District v. Rodriquez, supra, noting that "[t]he extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education..." 411 U.S. at 1304 n. 101.

The State's argument is particularly irrational in light of the fact that for those urban districts with declining enrollments, those most affected by the admission of these children, the addition of undocumented students, whose enrollment assists local districts to generate more state aid, may actually result in enhancing the ability of the districts to improve the quality of education to all students. See Appendix B and discussion, supra, at 30-33.

E. Educating Undocumented Alien Children is as Critically Important to the Child and to Society as Educating all Children.

Texas cynically argues not only that education of these children is unnecessary because the children cannot be citizens or participate in the political process but also that educating them is a waste of its educational resources because an educated undocumented alien is more likely than an uneducated alien to be deported and leave the state.[18/] Does Texas suggest that it actually prefers that undocumented aliens who remain in Texas grow up ignorant, illiterate, locked into a life of virtual serfdom?

Not since slavery has this nation tolerated an educational policy that in-

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18/ See Brief for Texas at 28 (This citation is to the State's unprinted brief filed with the Court August 29, 1981).

tentionally denies a vulnerable group of children the chance to learn. Not since slavery has this nation condoned education policies that condition access to primary education on future employment, future residence or future participation in the political process. To the contrary, this nation has embraced a policy that <u>every</u> child deserves a chance. Thus, children are not discarded because they are slow learners, physically handicapped, hyperactive, mentally retarded, terminally ill, non-English speaking, poor, learning disabled, or juvenile delinquents. Educators are expected to meet the challenges presented by their diverse charges not only because it is essential to the growth and well being of the individual child but also because the future health and vitality of society depend on it.

While it is clear that children have a right to education regardless of their future residence, it is also clear from the undisputed evidence presented at both district court hearings that the majority of these children are here to stay and may very well adjust their status to permanent resident and U.S. citizen. The district court in Doe v. Plyler observed, "[W]itnesses from both sides testified that the illegal alien of today may well be the legal alien of tomorrow." 458 F. Supp. at 477. This uncontested fact was reiterated in In re Alien Children: "One fact remains free from serious dispute: the great majority of the undocumented children who have been or would be excluded from the public schools pursuant to the State statute are or will become permanent residents of this country. " 501 F. Supp. at 597.

By excluding these children from public schools, Texas is creating enormous social problems. As Bishop John Edward McCarthy testified in In re Alien Children:

> We are keeping certain people poor, and what we are manufacturing now is a monumental social cost to our society ten and twenty years from now...We are manufacturing ignorance; to be ignorant in society is to be non-productive; to be non-productive means for many instances to be forced into a state of crime. ..[W]hether it be right now in the form of modest increases in tuition in public school operating cost, or ...in terms of social cost...fifteen years from now, we will pay this bill....

Id. at 597.

The devastating effects of illiteracy--on society and on the individual--are recognized not only in the United States but also in the international community. Indeed, today the importance of providing children the opportunity to learn basic literary skills is con-

sidered so fundamental that primary education is identified as an important human right in virtually every international human rights instrument.[19/]

Consistent with the international goal of universal literacy, the Constitution of Mexico guarantees compulsory, free elementary education to all human beings. MEXICO CONST. art. 3 (1917, amended 1946). This guarantee is not

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19/ See, e.g., Article 47, Amended Charter of the Organization of American States (Protocol of Burenos Aires), T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A, O.A.S.O.R., OEA/Ser. A/2, add.2 (entered into force February 27, 1970); Article 26, Universal Declaration of Human Rights, G.A. Res. 217A U.N. Doc. A/810 (1948); Principle 7, Declaration on the Rights of the Child, G.A. Res. 1386 (1959); Article XII, American Declaration of the Rights and Duties of Man, O.A.S.O.R., O.E.A. Ser. L/V/II,23, Doc 21, Rev.2 (English, 1975); Articles 13, 14, The International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200A (XXI)(1966) entered into force March 23, 1976; UNESCO Convention against Discrimination in Education, U.N.T.S. vol. 429, No. 6193, p. 93 (1960) (entered into force May 22, 1962).

conditioned on immigration status nor is it restricted to Mexican citizens or nationals. The guarantee extends to all persons, including foreigners, in the territory of Mexico. Id. art. 33.20/

To deprive children of education is to make them captives of poverty and hopelessness. Literacy, the ability to

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20/ That Mexico places a very high priority on education was confirmed by the State's international law expert Covey Oliver, who agreed that Mexico spends the highest percentage of its gross national product on education of any country in the Western Hemisphere. In re Alien Children, Record of Proceedings, vol. XXI at 3199. Oliver, who described section 21.031 as "detestable" Id. at 3144, also recognized education and literacy as significant human rights and fundamental to economic and social development. After cataloguing international efforts to combat illiteracy, "not only by UNESCO, but by USAID, the World Bank the InterAmerican Foundation, the Organization of American States itself and various sectarian and lay private groups" Id. at 3197, Oliver observed "The fight for literacy is fundamental to economic as well as social development as seen in all development doctrines that I know anything about." Id.

communicate, to understand and be understood is the most fundamental of human skills without which neither modern technology nor modern nations could exist. As the Commissioner of Education for the United States Dr. Ernest G. Boyer stated in his opening remarks to the 1978 International Literacy Day Conference:

> (L)iteracy-acquiring written language skills-is a basic human right. It acknowledges that the capacity to send and receive messages sets humanity apart from all other forms of life, and that through language we are bound together in the profound interdependence we call society.
>
> All we know, all we fear, and all we hope is created and conveyed through symbols, and a man or woman who does not master the written word is isolated from the past, ignorant of the future, trapped in a tiny world of narrow possibilities, and tragically cut off from the benefits of life.

Proceedings of the International Literacy Day Conference at 19. (Plaintiff-Appellee Exhibit No. 301 at 19, In re Alien Children.)

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

FRED FUCHS
Counsel of Record
for Amicus Curiae

BARBARA HINES
Attorney for Amicus
Curiae

900 Perry Brooks Building
Eighth on Brazos Street
Austin, Texas 78701
(512) 476-7244

APPENDIX A

H.B. No. 467-110
By Luna, et al.

A BILL TO BE ENTITLED

AN ACT

RELATING TO STUDENTS ELIGIBLE FOR

ADMISSION TO PUBLIC SCHOOLS

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H.B. No. 467-110
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AN ACT

RELATING TO STUDENTS ELIGIBLE FOR

ADMISSION TO PUBLIC SCHOOLS

HOUSE

COMMITTEE REPORT

1ST PRINTING

By Luna, et al. H.B. No. 467-110

A BILL TO BE ENTITLED

AN ACT

relating to students eligible for admission to public schools.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsections (a), (b), and (c), Section 21.031, Texas Education Code, as amended, are amended to read as follows:

(a) All children who are [~~citizens of the United States or legally admitted aliens and who are~~] over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is [~~a citizen of the United States or a legally admitted alien and who is~~] over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are [~~either citizens of the United States or legally admitted aliens and who are~~] over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful

control resides within the school district.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

COMMITTEE REPORT

The Honorable Bill Clayton 04/28/81
(date)
Speaker of the House of Representatives

Sir:

We, your COMMITTEE ON PUBLIC EDUCATION, to whom was referred H.B. 467-110, have had the same under consideration and beg to report back with the recommendation that it

(X) do pass, without amendment.
(-) do pass, with amendment(s).
( ) do pass and be not printed; a Complete Committee Substitute is recommended in lieu of the original measure.

A fiscal note was requested.
(X) yes ( ) no

An author's fiscal statement was requested. ( ) yes (X) no

An actuarial analysis was requested.
( ) yes (X) no

The Committee recommends that this measure be placed on the (~~Local~~) or (~~Consent~~) Calendar.

This measure
( ) proposes new law.
(X) amends existing law.

House Sponsor of Senate Measure _____.

The measure was reported from Committee by the following vote:

	AYE	NAY	PNV	ABSENT
Atkinson, Ch.	X			
Blanton, V. C.	X			
Haley, C. B. O.		X		
Barton	X			
Bryant	X			
Evans				X
Fox		X		
Glossbrenner	X			
Hall, L.	X			
Hanna				X
Peveto	X			

Total

7 aye
2 nay
0 present, not voting
2 absent

Hamp Atkinson
CHAIRMAN

Rynolds
COMMITTEE COORDINATOR

BILL ANALYSIS

Background Information

Section 21.031, Texas Education Code, presently prohibits persons between the ages of five and 21 who are not citizens of the United States or legally admitted aliens from attending the public schools of Texas free of charge.

Purpose

This bill removes the provision in the Texas Education Code that a person must be a U.S. citizen or a legally admitted alien to be admitted to the public schools free of charge.

Section by Section Analysis

S1. Amends Section 21.031(a), (b), (c), TEC, removing the provision that persons between the ages of five and 21 must be U.S. citizens or legally admitted aliens in order to be eligible to attend the public schools of Texas free of charge.

S2. Emergency clause.

Rulemaking Authority

It is the opinion of the committee that this does not delegate rulemaking authority to a state agency, office, department, or institution. As stated in the attached fiscal note, no fiscal implication or additional cost is anticipated.

Summary of Committee Action

Public notice was posted in accordance with the Rules of Procedure of the House of Representatives, and a public hearing was held on April 7, 1981.

The following people testified in favor of the bill:

Mr. Albert Cortez, Director, School Finance Program, I.D.R.A., San Antonio, on his own behalf;

Mr. Thomas V. Murto, III, an attorney from Garland, Texas, on his own behalf;

Mr. Robby Collins from Dallas, on behalf of the Dallas I.S.D.;

Ms. Ruby Clifton, a consultant from Houston I.S.D., on behalf of the school district;

Ms. Linda B. Team, Executive Director, Texas Impact, and Associate Director, Texas Conference of Churches, on behalf of the organizations;

and Mr. Jim Montgomery, Legislative Assistant, Christian Life Commission, on behalf of the Commission.

The following people did not testify, but wished to demonstrate their support of H.B. 467:

Mr. John Donaldson, Texas State

Teachers Association, on behalf of the Association;

Mr. Richard Daly, Executive Director, Texas Catholic Conference, on his own behalf and that of the Conference;

and Ms. Celeste Guerrero, Education Consultant, Catholic Diocese of Dallas, on behalf of the Office of Education, Diocese of Dallas.

There was no opposition to the bill. It was referred to subcommittee, to be named by the Chair.

The subcommittee was made up of the following members:

Blanton, Chairman
Peveto
Glossbrenner

The subcommittee met on April 23, 1981, in a formal meeting and passed H.B. 467 favorably without amendments by the vote of 3:0:0:0.

The full committee considered H.B. 467 in a public hearing, and it was passed favorably without amendments, by the vote of 7-2-0-2.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE

March 20, 1981

Honorable Hamp Atkinson, Chairman
Committee on Public Education
House of Representatives
Austin, Texas

In Re: House Bill No. 467
By: Luna

Sir:

In response to your request pursuant to House Rules, Section 3.119, this office finds the fiscal implications of House Bill No. 467 (relating to students eligible for admission to public schools) to be as follows:

> No fiscal implication or additional cost to the State or units of local government attributable to the bill, should it be enacted, is anticipated.

Thomas M. Keel
Director

Source: Texas Education Agency; LBB
Staff: TK, HES, PA

APPENDIX B

THE DISTRIBUTION OF UNDOCUMENTED PUPILS IN TEXAS PUBLIC SCHOOLS: A FIRST LOOK

THE DISTRIBUTION OF UNDOCUMENTED PUPILS IN TEXAS PUBLIC SCHOOLS: A FIRST LOOK

Intercultural Development
Research Association

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THE DISTRIBUTION OF UNDOCUMENTED PUPILS IN TEXAS PUBLIC SCHOOLS: A FIRST ANALYSIS[1]

By

Albert Cortez

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Intercultural Development
Research Association

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The following sections of the original publication have been omitted from this reproduction: Foreward; Acknowledgements; Appendix B: Alphabetical Listing of School Districts Reporting Undocumented Student Enrollment (computer listing); Appendix C: Rank Order Listing by Number of Undocumented Students (computer listing); Appendix D: Rank Order Listing by Percent of Undocumented Pupils (computer listing); Appendix E: Rank Order Listing of Number of Undocumented Students by County District Number (computer listing); Appendix F: Geographic Dispersion of Undocumented Pupils in Texas by County (map).

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THE DISTRIBUTION OF UNDOCUMENTED PUPILS IN TEXAS PUBLIC SCHOOLS A FIRST ANALYSIS

Background

On September 18, 1980 Judge Woodrow Seals of the Federal District Court for the Southern District of Texas issued a ruling in the case entitled "In Re: Alien Children Education Litigation." In that ruling, the court found unconstitutional the Texas statute denying tuition free enrollment to undocumented children. Judge Seals, as well as other federal courts, consequently ordered that these students be allowed to register and attend all public schools throughout the state. Following that order, the Texas Education Agency (TEA) conducted a survey in which school districts were asked to indicate the number of undocumented children enrolled in their public schools (see page B22).

Throughout the litigation IDRA had been asked to provide technical assistance to the plaintiff's attorneys. Of prime interest to the legal advocates was research on the prospective number of undocumented children and the possible impact which their enrollment would have on Texas school systems. Due to the organization's interest in the number and distribution patterns of the undocumented student population enrolled in Texas Schools, IDRA subsequently acquired the data which had been compiled by TEA. This data was merged with official TEA figures on district's refined average daily attendance (ADA) for the 1979-80 school year in order to assess the proportion of a district's ADA which was composed of undocumented students. The resulting data base was in turn converted to computer processable formats and subjected to a variety of analyses.

Guiding the analysis were the following research questions.

(1) What were the total number of undocumented students which enrolled in Texas school systems following the September court order?

(2) What were the total number of undocumented students within individual school districts?

(3) How many school districts reported enrollments of undocumented children?

(4) What types of school districts reported undocumented students, i.e., size (ADA); location within the state?

(5) What proportion of a district's ADA did the undocumented enrollment represent?

The results of these analyses are presented in subsequent sections of this report.

Some Caveats

Although TEA's request for data can be considered "official" in the sense that school districts were required to submit the information on undocumented

student enrollment, the true accuracy of the counts submitted has been questioned. Some argue that the counts are underestimated in certain districts due to the fact that some school officials may empathize with the undocumented child, or do not bother to stringently pursue the identification of all such children residing in the district. Others, however, point out that the complexities of immigration law, coupled with most school officials' lack of expertise in the area, probably contributed to misclassification of students as undocumented and subsequent inflated school district counts.

Given that the counts submitted to TEA were unverified and because districts lacked specific procedures to insure that the students identified in their report were, in fact, undocumented, the data must be approached with caution, and subsequent generalization tempered by this

knowledge.

Undocumented Student Enrollment

Of critical interest to both proponents as well as opponents of the enrollment of undocumented children in Texas schools is the number of such children attending public schools within individual districts. Prior to their enrollment and throughout the legal battles, speculation abounded on this issue. TEA, for example, subcontracted a study conducted by a Dallas research firm which concluded that there were over 120,000 undocumented children residing in Texas. In contrast, IDRA proposed that although it was difficult to ascertain exact counts, the numbers more closely approximated 20,000-30,000 children. Due to the clandestine existence of undocumented families, however, little concrete data actually existed at that time. Clear factual distribution patterns of undocu-

mented pupils have now become apparent following the enrollment of these students.

Most noteworthy among these early statistics is that only 332 of the 1,080 Texas school systems reported the presence of any undocumented students (see Table 1).

Of the 332 districts, 204 (61 percent) reported having ten or fewer undocumented children enrolled. In contrast, only thirteen school districts reported counts in excess of 100 pupils. Not surprisingly, the major urban/suburban districts, which have the greatest pupil enrollments in the state, also have the greatest undocumented student enrollments. In fact, inspection of a rank order listing by number of undocumented student counts reveals that six major districts had a total of 5,405 undocumented pupils, a figure equal to nearly 50 percent of

the statewide total.

Concentration Characteristics

The IDRA analysis also examined the proportion which undocumented pupils constitute of a district's existing enrollment and, more specifically, the percentage that such pupils represent of a district's ADA. To arrive at these figures, IDRA staff acquired district refined ADA data for the 1979-80 (the latest available) school year and calculated the percentages. The resulting information yielded revealing distributional patterns concerning concentration levels of undocumented pupils within Texas schools. The most striking of these statistics indicate that undocumented students represented less than one percent of a district's ADA in 240 (72 percent) of the 332 districts reporting (see Table 2). In 52 of the remaining 92 districts, undocumented students con-

stituted between one percent and three percent of a district's ADA. At the opposite end of the scale, these students represented more than five percent of a district's ADA in only twelve (3.3 percent) of the 332 districts reporting undocumented enrollment.

The relatively low proportions which these students represent of a district's total attendance is perhaps most apparent in the listing which rank orders districts according to the percentage of undocumented pupils within the school systems. Inspection of the figures reveals that relatively high counts of undocumented students are generally found in relatively high enrollment districts, with the proportional relationships reflected in the school districts' low percentages. On the other hand, close inspection of districts with unusually high percentages of undocumented pupils

reveals that, for the most part, they tend to be low enrollment districts in which small numerical increases in enrollment constitute substantial proportional changes.

A Closer Examination of "High Count" School Systems

Due to the concern which opponents of the mandated enrollment of undocumented children expressed regarding the impact of high counts of undocumented children. IDRA researchers proceeded to examine in more detail the characteristics of districts reporting relatively high counts.

For our purposes, high count school districts were defined as school systems whose reported undocumented student enrollment equaled or exceeded 50. As noted earlier, high count school systems were found to include primarily large urban/suburban school districts, and

selected south Texas districts which were located relatively close to the Mexican border.

Inspection of the data revealed that only 37 school districts had reported counts equal or greater than 50 (see Table 3).

As one means of assessing the impact of the influx of undocumented students on these systems, the researchers chose to examine their enrollment histories. This decision was based on the notion that the increased enrollment created by the undocumented student population was comparable in many respects to other fluctuations in attendance levels.

Inspection of the resulting data set exposed the fact that 17 of the 37 districts analyzed had experienced significant declines in enrollment during the five-year period preceding the 1980-81 school year. A review of Table 4 reveals

that Houston and Dallas experienced student decline in excess of 11,000 pupils, in their ADA. Ft. Worth dropped 8,900 pupils, Spring Branch declined by over 5,600, San Antonio lost more than 3,800 pupils and Corpus Christi declined by 2,900 students. Further tabulations reflected that for these 17 districts, the undocumented student enrollment was not even matching declines experienced by districts during the 1978-79 to 1979-80 period (the year preceding the undocumented students' enrollment) let alone the generally larger enrollment decreases during the preceding five year period. Tabulation of the 17 school district total reveals that, as a group, these school systems had a total decline in ADA of 58,005 pupils over the preceding five year period. During the 1979-80 school year these districts lost a total of 18,702 in pupil ADA. On the other hand,

the number of undocumented pupils in this same group totaled 5,721, a figure equal to 30.5 percent of the 18,702 pupil decline that these districts had experienced in the year prior to the enrollment of undocumented pupils.

Numerous important conclusions emerge from this subgroup analysis. First, in those districts which were experiencing enrollment declines, the undocumented students cushioned, although did not necessarily reverse the trend toward enrollment declines. With respect to state financial aid, the influx of undocumented children enabled some school systems to retain state funds that would have been lost because most state aid to school districts is based on a combination of factors involving district property wealth and ADA. In addition to preserving state aid, these students may also have prevented some increases in

local property taxes. Research done in the area of declining enrollment suggests that a school system's operating costs do not decrease in direct proportion to enrollment declines. Thus, in many of these systems, declining ADA and the corresponding decline in state aid would have shifted some of the burden of operating costs over to the local level. These communities would then have faced the option of either cutting back their programs to reflect the cuts in state aid resulting from enrollment decline, or assuming the residual costs. In general where undocumented enrollment replenished diminishing ADA, it can be said that the undocumented enrollment contributed to the district's ability to acquire additional state revenue and stave off local tax increases. The per pupil state revenue associated with the enrollment of undocumented children was in turn affec-

ted by the property wealth of the district, with state aid levels decreasing in proportion to local districts' wealth. This little discussed effect of the enrollment of undocumented students may explain the lack of opposition to or ambiguous posture regarding the issue by some school systems.

Districts with Increasing Enrollment

A further analysis of the subgroup of school systems with 50 or more undocumented children revealed the existence of a second set of school systems that have experienced low to moderate increases in enrollment over the preceding five year period.

Analysis of the data reflects that 20 of the 37 school district subgroup fell into this category (see Table 5). In these school systems, it would be accurate to state that the impact of an influx of undocumented children varies

distinctly from declining enrollment districts. It may be said, for example, that the undocumented students contribute, in these instances, to problems associated with growth in ADA (i.e., the need for more personnel, classroom space, supply needs, etc.). It is illogical, however, to assign all of the blame on the undocumented population for these districts' enrollment increases. Arguing from a different perspective one could contend that these same school systems have had a history of growth in enrollment and thus have (or should have) extensive experience in dealing with the issue. Moreover, if one examines the historical growth trends in these school systems it can be noted that the undocumented student counts were significantly lower than the ADA increase they had experienced in previous years (see Table 6).

Some Updated Statistics

Due to extensive interest in the numbers of undocumented students which might have enrolled in Texas schools after the October TEA survey was submitted, and the fact that legislation introduced by State Rep. Albert Luna required such data, Rep. Luna initiated a follow-up survey of all school systems which had originally reported undocumented student enrollments to TEA. Recognizing the significance of such information, IDRA requested and received the data which was originally collected by Rep. Luna's staff and subjected it to a variety of analyses.

An important issue regarding this data involves the fact that it includes responses from only 47 of the 332 school systems which had originally reported counts to TEA. The sample itself is composed of districts who voluntarily

responded to the request for information, and thus should not be assumed to constitute a representative random sample. Although not meeting required sampling criteria, the cross-section of school systems does provide some useful information concerning the growth in undocumented enrollment counts in those districts and may be indicative of a pattern common among other systems.

The most striking finding gleaned from the analysis of the data is that, of the 2,745 additional undocumented pupils reported by the 47 respondents, 2,464 (89.8 percent) were concentrated in 5 school districts, with the remaining 281 pupils distributed throughout the remaining 42 systems (see Table 7). A review of this subset further reveals that, although substantial, these counts resulted in relatively small changes in the percentages which the undocumented

enrollment constituted of a district's ADA, averaging about a .5 percent increase in all but Brownsville ISD. Not surprisingly, the relative concentration of these students parallels the distributional patterns reflected in the original survey data collected by TEA. Further inspection of the data reflects that, in the majority of the 47 districts which volunteered updated counts, the number of undocumented pupils remained at relatively similar levels. The data reflects, for example that 35, or 74 percent of the total 47 districts had experienced increased counts of 10 or fewer pupils. Of the total group, 13 respondents reported no change in the undocumented pupil counts, whereas a total of 13 school systems actually reported a decline in their undocumented student population. All of the aforementioned findings suggest that any districts not heavily

impacted in the initial enrollment period may anticipate a continuation of this trend in the future.

One serious question raised by the reported growth in undocumented student counts, however, is whether those school districts which experienced increased undocumented student enrollment between October and February can anticipate similar increases in the future. Unfortunately, a conclusive answer cannot be presented at this time. Yet it may be reasonable to assume that the increase reported between the initial survey and the February follow-up is more indicative of the cautious reaction of the undocumented population to the schools forced open door policy, rather than an influx of new undocumented families into Texas. A clearer indicator will be available once second and third year data on these students becomes available. In the

interim, however, it may help to consider that most studies done on the undocumented have indicated that: (1) they usually do not migrate as families, and (2) they come to this country seeking employment and not for the purpose of seeking better educational conditions for their offspring.

Some General Observations

Analyses of the aforementioned data leads the author to the following conclusions.

- The actual counts of undocumented students which enrolled in Texas public school fell far short of many original projections.
- With the exception of major urban and a few high enrollment large city school systems, undocumented students represented insignificant numerical increases in most district's ADA.

. For the most part, the percentage of undocumented pupils in proportion to a district's ADA was generally insignificant, falling below 5 percent in 97 percent of all districts reporting undocumented student counts.

Following the mandated enrollment of undocumented children, some school districts modified their position and withdrew their opposition to such enrollment. A few, however, maintain that the enrollment of these undocumented children detracts from the quality of educational programs available to citizen children residing in their districts. Although this may be the case in some very limited instances for the great majority of school systems in the state, these positions are not supported by the data.

THE ATTORNEY GENERAL OF TEXAS

Supreme Court Building
P. O. Box 12548
Austin, TX 78711
512/475-2501

September 5, 1980

To The Administrator Addressed:

On Thursday, September 4, 1980, Justice Lewis Powell of the United States Supreme Court entered an order vacating the stay of the United States Court of Appeals for the 5th Circuit of an injunction issued by District Judge Woodrow Seals ordering the State of Texas to provide tuition free education to illegal alien children within the State.

The effect of Justice Powell's order is to reinstate the District Court's injunction and require the immediate admission of these children to the public schools of Texas regardless of their immigration status. This order has no affect on any other admission requirements, such as the bona fide residency requirement.

Justice Powell stated that individual school districts which are harmed disproportionately as a result of the

influx of illegal alien children will be entitled to petition him for a stay on a case by case basis. You will soon be receiving instructions from the Texas Education Agency regarding the collection of information which will be helpful in establishing adverse impact on your district. In the meantime, while you must admit the illegal alien children, you should attempt to identify them and keep records of the number admitted.

Sincerely,

Mark White
Attorney General

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TEXAS EDUCATION AGENCY

Division of State Funding

District Name _____ Co. Dist. #

Survey of Undocumented Alien Students

Authority for Data Collection: September 4, 1980 Order of United States Supreme Court.

Planned Use of the Data: Determine effect of enrollment of undocumented alien students.

Instructions: This form should be completed by every district in the state. If you do not have any undocumented alien students, write N. A. across the front of form and sign. If you are asking for a stay of the court order, the completed form is due in TEA by September 22. Otherwise, it is due October 1, 1980. If further clarification is needed, contact Thomas C. Patton at (512) 475-4747.

1. Number of Undocumented Alien Students Enrolled

Grades	Number of undocumented alien students enrolled as of close of school day September 19, 1980.
K	
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
TOTAL	

2. Does this district intend to petition for a stay of the Court Order based upon the above information? ☐ yes ☐ no

The Texas Education Agency will request additional information from districts petitioning for a stay of the Court Order.

Typed Name of Superintendent	Telephone	Date	

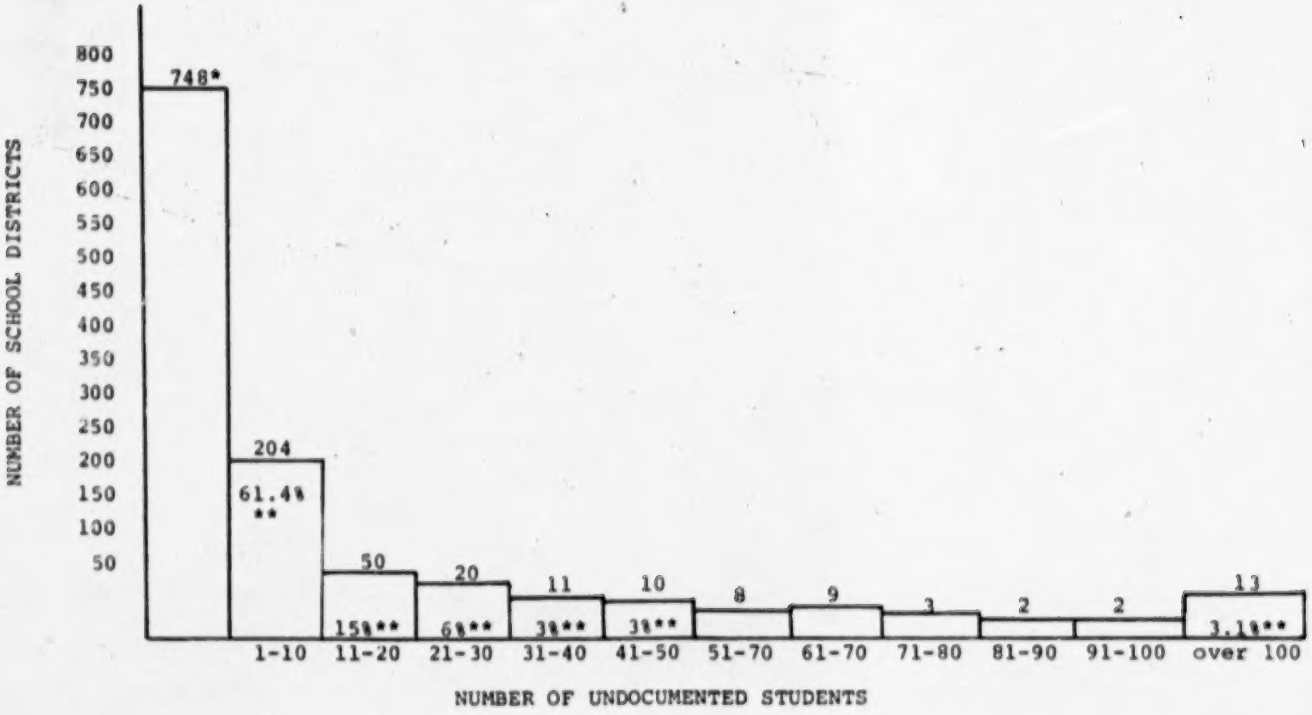
Signature of Superintendent

Return to: Texas Education Agency
Division of State Funding
201 East 11th Street
Austin, Texas 78701

FIN-126

TABLE 1

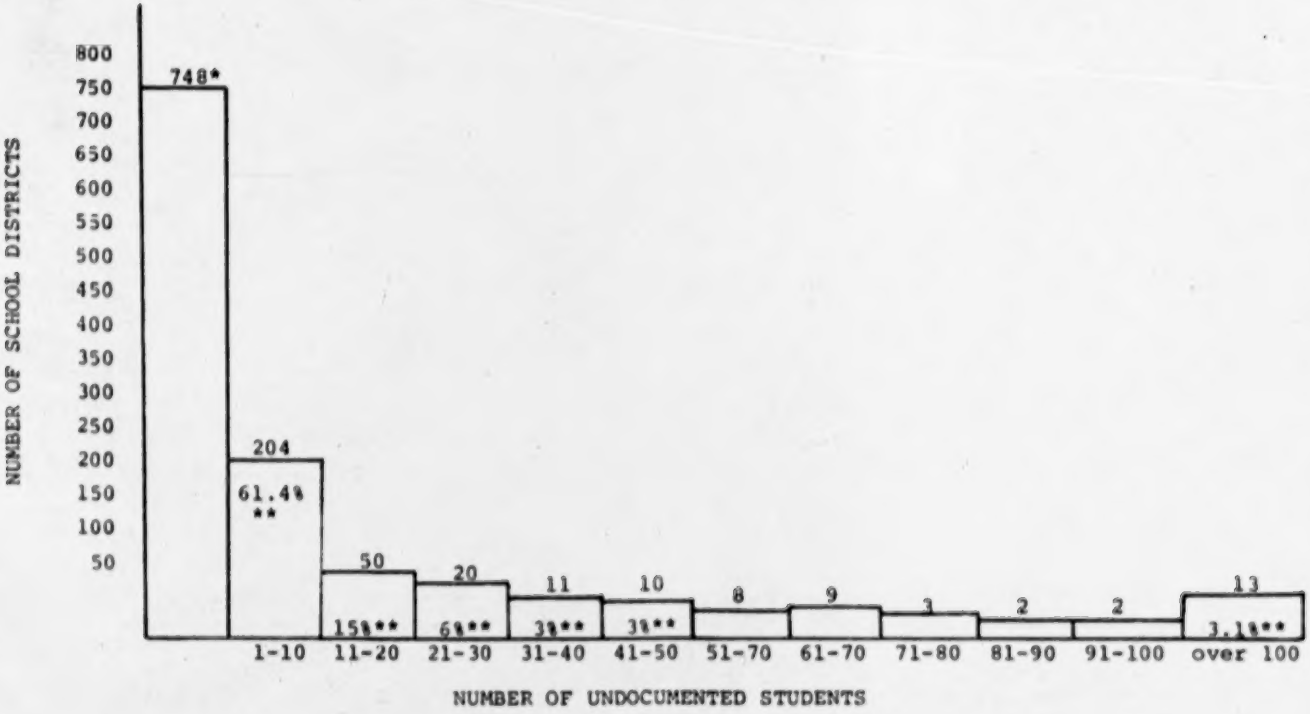
DISTRIBUTION OF UNDOCUMENTED STUDENTS
BY COUNTS WITHIN SCHOOL DISTRICTS



*Not reporting any undocumented students to TEA.
**Computed as a percentage of the 332 school districts reporting undocumented counts to TEA.
Source: Reports submitted by school districts to Texas Education Agency, Oct. 1980.

TABLE 1

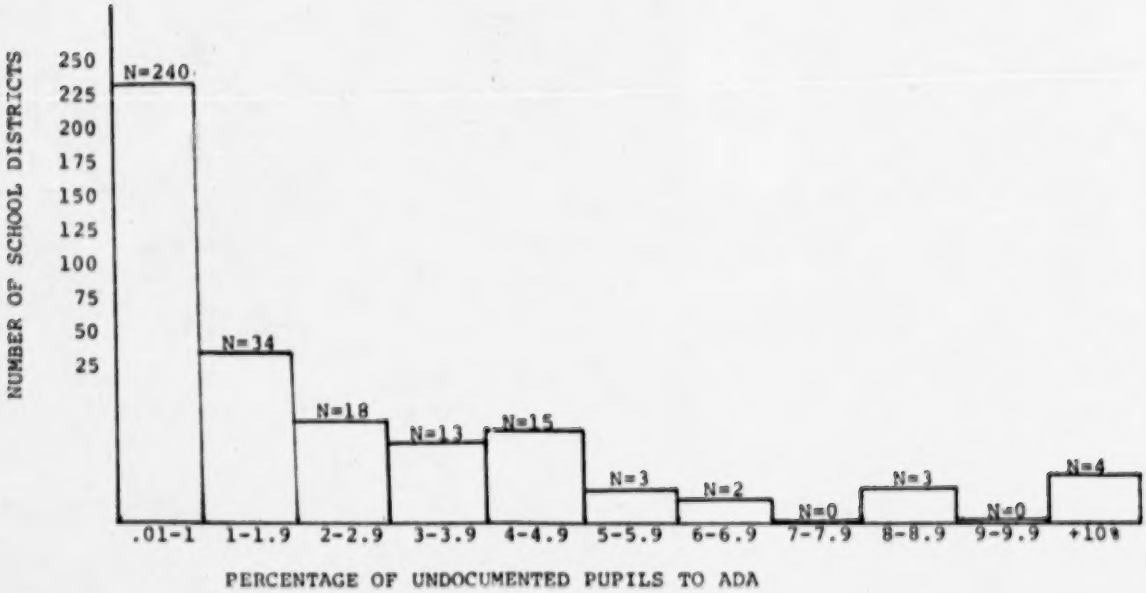
DISTRIBUTION OF UNDOCUMENTED STUDENTS
BY COUNTS WITHIN SCHOOL DISTRICTS



*Not reporting any undocumented students to TEA.
**Computed as a percentage of the 332 school districts reporting undocumented counts to TEA.
Source: Reports submitted by school districts to Texas Education Agency, Oct. 1980.

TABLE 2

STATEWIDE DISTRIBUTION OF UNDOCUMENTED PUPILS
BY PERCENTAGE OF UNDOCUMENTED PUPILS TO DISTRICT'S ADA



Statewide Ave. 1.2%
Total N = 332
*Computed as a percentage of the 331 school districts reporting undocumented student counts.
Source: Reports submitted by school districts to Texas Education Agency, Oct. 1980.

TABLE 3

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS

COUNTY DISTRICT NUMBER	SCHOOL DISTRICT	ADA	UNDOCUMENTED PUPILS	UNDOCUMENTED PUPILS AS PERCENTAGE OF ADA
101-912	HOUSTON	173,861	2,506	1.4
057-905	DALLAS	144,887	810	.7
068-901	ECTOR COUNTY	20,996	684	3.3
220-905	FORT WORTH	57,618	545	.9
071-902	EL PASO	53,697	486	.9
015-907	SAN ANTONIO	55,478	394	.7
108-908	MISSION	6,390	207	3.2
101-917	PASADENA	32,244	186	.6
031-901	BROWNSVILLE	23,314	182	.8
108-911	SHARYLAND	1,511	170	11.3
101-911	GOOSECREEK	13,887	158	1.1
101-902	ALDINE	29,489	123	.4
101-920	SPRING BRANCH	31,081	122	.4
015-905	EDGEWOOD	16,239	92	.6
071-905	YSLETA	40,501	91	.2
123-907	PORT ARTHUR	10,697	82	.8
227-901	AUSTIN	51,113	80	.2
108-903	EDCOUCH-ELSA	2,995	78	2.6
214-901	RIO GRANDE	4,010	75	1.9
243-905	WICHITA FALLS	12,997	69	.5
108-906	McALLEN	15,029	67	.4
083-903	SEMINOLE	1,837	67	3.7
031-909	POINT ISABEL	1,513	67	4.4
079-901	LAMAR	7,790	66	.9

TABLE 3

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS

COUNTY DISTRICT NUMBER	SCHOOL DISTRICT	ADA	UNDOCUMENTED PUPILS	UNDOCUMENTED PUPILS AS PERCENTAGE OF ADA
178-904	CORPUS CHRISTI	34,377	63	.2
251-901	DENVER CITY	1,272	62	4.9
253-901	ZAPATA	1,480	60	4.1
031-911	RIO HONDO	1,239	60	4.8
101-910	GABNA PARK	10,441	57	.6
108-902	DONNA	4,659	56	1.2
015-904	HARLANDALE	14,726	55	.4
179-901	PERRYTON	1,609	53	3.3
233-901	SAN FELIPE-DEL RIO	8,327	53	.6
108-909	PHARR	12,060	52	.4
095-905	PLAINVIEW	5,501	51	.9
249-905	DECATUR	1,251	50	.4

TABLE 4

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS AND WITH DECLINING ADA

DISTRICT	UNDOCUMENTED STUDENT ENROLLMENT	1975-76 ADA	1978-79 ADA	1979-80 ADA	ADA DECLINE 1975-76/1979-80	ADA DECLINE 1978-79/1979-80
HOUSTON	2,506	185,844	177,378	173,861	- 11,983	- 3,517
DALLAS	810	126,777	118,775	114,887	- 11,890	- 3,888
FORT WORTH	345	66,520	61,414	57,618	- 8,902	- 3,796
EL PASO	486	55,406	53,796	53,697	- 2,609	- 99
SAN ANTONIO	394	59,340	56,241	55,470	- 3,870	- 771
PASADENA	186	33,265	32,542	32,244	- 1,021	- 298
SPRING BRANCH	120	36,	32,713	31,081	- 5,662	- 1,663
EDGEWOOD	92	18,251	17,134	-16,239	- 2,012	- 895
PORT ARTHUR	82	11,991	10,829	10,697	- 1,294	- 132
AUSTIN	80	52,980	52,936	51,113	- 1,867	- 1,823
WICHITA FALLS	69	14,412	13,389	12,997	- 1,415	- 392
SEMINOLE	67	1,903	1,884	1,837	- 66	- 47
CORPUS CHRISTI	63	37,277	34,958	34,377	- 2,900	- 581
DENVER CITY	62	1,356	1,357	1,272	- 84	- 85
HARLANDALE	55	16,625	15,290	14,726	- 1,899	- 564

TABLE 4

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS AND WITH DECLINING ADA

DISTRICT	UNDOCUMENTED STUDENT ENROLLMENT	1975-76 ADA	1978-79 ADA	1979-80 ADA	ADA DECLINE 1975-76/1979-80	ADA DECLINE 1978-79/1979-80
PERRYTON	53	1,841	1,663	1,690	- 232	- 54
PLAINVIEW	51	5,800	5,598	5,501	- 299	- 97
TOTALS	5,721				58,005	18,702

TABLE 5

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS WITH LOW
TO MODERATE INCREASES IN ADA

DISTRICT	UNDOCUMENTED STUDENT ENROLLMENT	1975-76 ADA	1978-79 ADA	1979-80 ADA	ADA CHANGE 1975-76/1979-80	ADA CHANGE 1978-79/1979-80
ECTOR COUNTY	684	21,068	20,792	20,996	-72	204
MISSION	207	6,014	6,417	6,390	376	-27
BROWNSVILLE	182	20,548	22,388	23,614	3,066	1,226
SHARYLAND	170	1,235	1,463	1,511	276	48
GOOSE CREEK	158	13,299	13,614	13,887	588	226
ALDINE	123	28,581	28,833	29,489	908	656
YSLETA	91	37,686	40,073	40,501	2,815	428
BRYAN	78	8,293	8,412	8,644	351	232
EDCOUCH-ELSA	78	2,822	2,932	2,995	173	63
RIO GRANDE	75	3,376	3,838	4,010	634	172
McALLEN	67	13,206	14,838	15,029	1,823	191
POINT ISABEL	67	1,583	1,503	1,513	-80	10
LAMAR	66	7,436	7,769	7,790	354	21
RIO HONDO	60	1,205	1,268	1,239	29	-29
ZAPATA	60	1,325	1,427	1,480	155	53
GALENA PARK	57	9,957	10,304	10,441	484	137

TABLE 5

SCHOOL DISTRICTS WITH 50 OR MORE
UNDOCUMENTED PUPILS WITH LOW
TO MODERATE INCREASES IN ADA

DISTRICT	UNDOCUMENTED STUDENT ENROLLMENT	1975-76 ADA	1978-79 ADA	1979-80 ADA	ADA CHANGE 1975-76/1979-80	ADA CHANGE 1978-79/1979-80
DONNA	56	4,211	4,524	4,659	448	135
SAN FELIPE-DEL RIO	53	7,860	8,439	8,327	467	-112
PHARR-SAN JUAN-ALAMO	52	10,257	11,969	12,060	1,803	91
DECATUR	50	1,241	1,274	1,251	-23	10
TOTAL	2,434					

TABLE 6

SCHOOL DISTRICTS REPORTING +50 UNDOCUMENTED PUPILS
FIVE YEAR ATTENDANCE HISTORIES

Part 1

SCHOOL DISTRICT	UNDOC. STUDENTS	DAILY AVERAGE ATTENDANCE 1975-76	1976-77	1977-78	1978-79	1979-80
HOUSTON	2,506	185,844	183,735	180,868	177,378	173,861
DALLAS	810	126,777	121,868	119,682	118,775	114,887
ECTOR COUNTY	684	21,068	21,095	21,158	20,792	20,996
FORT WORTH	545	66,520	64,800	62,369	61,414	57,618
EL PASO	486	55,406	55,117	54,596	53,796	53,697
SAN ANTONIO	394	59,340	57,895	57,162	56,241	55,470
MISSION	207	6,014	6,138	6,331	6,417	6,390
PASADENA	186	33,265	32,790	32,577	32,542	32,244
BROWNSVILLE	182	20,548	21,075	21,597	22,388	23,614
SHARYLAND	170	1,235	1,302	1,369	1,463	1,511
GOOSE CREEK	158	13,299	13,465	13,691	13,614	13,887
ALDINE	123	28,581	28,897	28,724	28,833	29,489
SPRING BRANCH	120	36,743	25,596	34,279	32,713	31,081
EDGEWOOD	92	18,251	17,526	17,775	17,134	16,239
YSLETA	91	37,686	38,864	39,374	40,073	40,501
PORT ARTHUR	82	11,991	11,588	11,237	10,829	10,697
AUSTIN	80	52,980	52,823	53,109	52,936	51,113
BRYAN	78	8,293	8,412	8,341	8,412	8,644
EDCOUCH ELSA	78	2,815	2,835	2,908	2,932	2,995
RIO GRANDE CITY	75	3,376	3,532	3,722	3,838	4,010
WICHITA FALLS	69	14,412	14,163	13,798	13,389	12,997
McALLEN	67	13,206	13,465	13,754	14,838	15,029
SEMINOLE	67	1,903	1,846	1,899	1,884	1,837
POINT ISABEL	67	1,568	1,549	1,533	1,503	1,513

TABLE 6

SCHOOL DISTRICTS REPORTING +50 UNDOCUMENTED PUPILS
FIVE YEAR ATTENDANCE HISTORIES

Part 1, con't

SCHOOL DISTRICT	UNDOC. STUDENTS	DAILY AVERAGE ATTENDANCE 1975-76	1976-77	1977-78	1978-79	1979-80
LAMAR	66	7,436	7,609	7,562	7,769	7,790
CORPUS CHRISTI	63	37,277	36,152	35,563	34,958	34,377
DENVER CITY	62	1,356	1,338	1,337	1,357	1,272
RIO HONDO	60	1,215	1,217	1,284	1,268	1,239
ZAPATA	60	1,266	1,355	1,401	1,427	1,480
GALENA PARK	57	9,957	9,942	10,049	10,304	10,441
DONNA	56	4,211	4,253	4,430	4,524	4,659
HARLANDALE	55	16,625	16,372	15,743	15,290	14,726
PERRYTON	53	1,841	1,754	1,702	1,663	1,609
SAN FELIPE-DEL RIO	53	7,860	8,200	8,355	8,439	8,327
PHARR-SAN JUAN-ALAMO	52	10,257	10,717	11,109	11,969	12,060
PLAINVIEW	51	5,800	5,722	5,718	5,598	5,501
DECATUR	50	1,241	1,310	1,281	1,274	1,251

Part 2

SCHOOL DISTRICT	UNDOC. STUDENTS	CHANGE IN ADA 1975-76/ 1976-77	1976-77/ 1977-78	1977-78/ 1978-79	1978-79/ 1979-80	1975-76/ 1979-80
HOUSTON	2,506	- 2,109	- 2,867	- 3,490	- 3,517	11,983
DALLAS	810	- 4,909	- 2,186	- 907	- 3,888	-11,890
ECTOR COUNTY	684	27	63	- 366	204	- 72
FORT WORTH	545	- 1,720	- 2,431	- 955	- 3,796	- 8,902
EL PASO	486	- 289	- 521	- 800	- 99	- 1,709
SAN ANTONIO	394	- 1,445	- 733	- 921	- 771	- 3,870
MISSION	207	124	193	86	- 27	376
PASADENA	186	- 475	- 213	- 35	- 298	- 1,021

TABLE 6

SCHOOL DISTRICTS REPORTING +50 UNDOCUMENTED PUPILS
FIVE YEAR ATTENDANCE HISTORIES

Part 2, con't

SCHOOL DISTRICT	UNDOC. STUDENTS	CHANGE IN ADA 1975-76/ 1976-77	1976-77/ 1977-78	1977-78/ 1978-79	1978-79/ 1979-80	1975-76/ 1979-80
BROWNSVILLE	182	527	522	791	1,226	3,066
SHARYLAND	170	67	67	94	48	276
GOOSE CREEK	158	166	226	- 77	273	588
ALDINE	123	316	- 173	109	656	908
SPRING BRANCH	120	- 1,147	- 1,317	- 1,566	- 1,632	- 5,662
EDGEWOOD	92	- 725	249	- 641	- 895	- 2,012
YSLETA	91	1,178	510	699	428	2,815
PORT ARTHUR	82	- 403	- 351	- 408	- 132	- 1,294
AUSTIN	80	- 157	286	- 173	- 1,823	- 1,867
BRYAN	78	119	- 71	71	232	351
EDCOUCH ELSA	78	20	73	24	63	180
RIO GRANDE CITY	75	156	190	116	172	634
WICHITA FALLS	69	- 249	- 365	- 409	- 392	- 1,415
McALLEN	67	259	289	1,084	191	1,823
SEMINOLE	67	- 57	53	- 15	47	- 66
POINT ISABEL	67	- 19	- 16	- 30	10	- 55
LAMAR	66	173	- 47	207	21	354
CORPUS CHRISTI	63	- 1,125	- 589	- 605	- 581	- 2,900
DENVER CITY	62	- 18	- 1	20	- 85	- 84
RIO HONDO	60	2	67	- 16	- 29	24
ZAPATA	60	89	46	26	53	214
GALENA PARK	57	- 15	107	255	137	484
DONNA	56	42	177	94	135	488
HARLANDALE	55	253	- 629	- 453	- 564	- 1,899

TABLE 6

SCHOOL DISTRICTS REPORTING +50 UNDOCUMENTED PUPILS
FIVE YEAR ATTENDANCE HISTORIES

Part 2, con't

SCHOOL DISTRICT	UNDOC. STUDENTS	CHANGE IN ADA 1975-76/ 1976-77	1976-77/ 1977-78	1977-78/ 1978-79	1978-79/ 1979-80	1975-76/ 1979-80
PERRYTON	53	- 87	- 52	- 39	- 54	- 232
SAN FELIPE-DEL RIO	53	340	155	84	- 112	467
PHARR-SAN JUAN-ALAMO	52	460	392	860	91	1,803
PLAINVIEW	51	- 78	- 4	- 120	- 97	- 299
DECATUR	50	69	- 29	- 7	- 23	10

TABLE 7

CHANGES IN UNDOCUMENTED STUDENT TOTALS
FOR SELECTED SCHOOL SYSTEMS
OCTOBER 1980 TO FEBRUARY 1981

DISTRICT	1979-80 ADA	OCTOBER 1980 UNDOCUMENTED STUDENT COUNT	FEBRUARY 1981 UNDOCUMENTED STUDENT COUNT	NET CHANGE	PERCENT OCT. UNDOCUMENTED ADA	PERCENT FEB. UNDOCUMENTED ADA	NET CHANGE
HOUSTON	173,861	2,506	3,595	1,089	1.4	2.1	.6
BROWNSVILLE	23,614	182	750	568	.8	3.2	2.4
DALLAS	114,877	810	1,215	405	.7	1.1	.4
FORT WORTH	57,618	545	755	210	.9	1.3	.4
YSLETA	40,501	91	283	192	.2	.7	.5
PASADENA	32,244	186	260	74	.6	.8	.2
HARLINGEN	10,881	15	60	45	.1	.6	.5
RIO GRANDE CITY	4,010	75	118	43	1.9	2.9	1.0
WACO	12,936	44	83	39	.3	.6	.3
AUSTIN	51,113	80	102	22	.15	.19	.04
CORPUS CHRISTI	34,377	63	81	18	.18	.23	.05
SAN ANGELO	12,822	33	50	17	.3	.4	.1
PORT ARTHUR	10,697	82	92	10	.8	.9	.1
AMARILLO	29,995	6	16	10	.02	.05	.03
IRVING	19,816	9	18	9	.05	.09	.04
NACOGDOCHES	4,380	18	25	7	.4	.6	.2

TABLE 7

CHANGES IN UNDOCUMENTED STUDENT TOTALS
FOR SELECTED SCHOOL SYSTEMS
OCTOBER 1980 TO FEBRUARY 1981

DISTRICT	1979-80 ADA	OCTOBER 1980 UNDOCUMENTED STUDENT COUNT	FEBRUARY 1981 UNDOCUMENTED STUDENT COUNT	NET CHANGE	PERCENT OCT. UNDOCUMENTED ADA	PERCENT FEB. UNDOCUMENTED ADA	NET CHANGE
SAN ANTONIO	55,478	394	400	6	.71	.72	.01
CARROLLTON-FARMERS BRANCH	11,284	6	11	5	.1	.1	0
TEXARKANA	5,542	0	2	2	0	.03	.03
EDEN	299	1	3	2	.3	1.0	.7
JUNCTION	756	13	14	1	1.7	1.9	.2
PLEASANT GROVE	1,246	2	2	0	.2	.2	0
MINERAL WELLS	3,456	8	8	0	.2	.2	0
EL PASO	53,697	486	486	0	.9	.9	0
ROMA	2,843	8	8	0	.3	.3	0
SAN DIEGO	1,419	2	2	0	.1	.1	0
TATUM	790	10	10	0	1.3	1.3	0
BEAUMONT	9,446	24	24	0	.3	.3	0
LUBBOCK	27,564	14	14	0	.1	.1	0
GATESVILLE	1,759	1	1	0	.1	.1	0
EVANT	215	6	6	0	2.8	2.8	0
RISING STAR	266	1	1	0	.4	.4	0

TABLE 7

CHANGES IN UNDOCUMENTED STUDENT TOTALS
FOR SELECTED SCHOOL SYSTEMS
OCTOBER 1980 TO FEBRUARY 1981

DISTRICT	1979-80 ADA	OCTOBER 1980 UNDOCUMENTED STUDENT COUNT	FEBRUARY 1981 UNDOCUMENTED STUDENT COUNT	NET CHANGE	PERCENT OCT. UNDOCUMENTED ADA	PERCENT FEB. UNDOCUMENTED ADA	NET CHANGE
BANDERA	935	2	2	0	.2	.2	0
ABILENE	15,717	15	15	0	.1	.1	0
FORESTBURG	95	2	1	-1	2.1	1.1	-1
JOAQUIN	549	3	2	-1	.5	.4	- .1
BRIDGE CITY	2,645	1	0	-1	.03	0	- .03
MIDLAND	13,533	7	6	-1	.05	.04	- .01
MARATHON	140	1	0	-1	.7	0	- .7
CARLISLE	345	1	0	-1	.3	0	- .3
SANTO	298	12	10	-2	.4	.3	- .1
KERRVILLE	3,107	2	0	-2	.1	0	- .1
EASTLAND	757	3	0	-3	.4	0	- .4
CYPRESS-FAIRBANKS	18,678	37	34	-3	.19	.18	.01
MEDINA	203	8	5	-3	3.9	2.5	-1.4
ALPINE	1,135	3	0	-3	.3	0	- .3
EDGEWOOD	16,239	92	85	-7	.6	.5	- .1

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Nos. 80-1538 & 80-1934

IN THE

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JAMES PLYLER, *et al.*,
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CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN, *et al.*,
Appellees.

On Appeals from the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE BISHOP OF THE EPISCOPAL DIOCESE OF DALLAS, TEXAS, AS AMICI CURIAE IN SUPPORT OF APPELLEES

DANIEL MARCUS
Attorney of Record
JOHN F. COONEY
CRAIG J. BLAKELEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Counsel for Amici Curiae

October 27, 1981

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure equal rights for all members of society. The Lawyers' Committee and its Washington,

D.C. local affiliate long have provided volunteer legal representation to noncitizens before courts, agencies, and legislative bodies in matters involving their constitutional rights.

The interest of the Washington Lawyers' Committee arises from its longstanding concern for ensuring the full vindication of the constitutional rights of the nation's substantial noncitizen population to equal protection and due process of law. The decision of these cases will affect importantly the constitutional rights of all noncitizens physically present in the United States. The Washington Lawyers' Committee submitted a Brief *Amicus Curiae* in the Fifth Circuit in *Plyler v. Doe* in support of appellees.

The Bishop of the Episcopal Diocese of Dallas, Texas, is The Right Rev. A. Donald Davies, D.D. The Diocese of Dallas consists of 48 counties in north central Texas, including Dallas and Fort Worth, with a population in excess of 3 million people. The Diocese first began working with undocumented Mexican workers in the early 1950s. In 1975, the Diocese, under the leadership of Bishop Davies, sponsored large numbers of alien refugees. Since then, the Diocese has provided pro bono legal services to the refugees and undocumented Mexican aliens. After passage of the statute at issue here, Bishop Davies founded and continues to support alternative schools for children of undocumented Mexican parents excluded from the public schools. The decision here will affect the future need for these alternative schools.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the important question whether a State may deny a free public education to an entire class

[1] All the parties have given written consent to the filing of this Brief. Copies of those consents have been lodged with the Clerk of the Court.

of undocumented alien children because of the presumed misconduct of their parents in entering this country. Although the other submissions to this Court address a broad range of issues, the cases may be decided on traditional equal protection grounds. Texas simply has failed to articulate any rational State basis for discriminating against these children.

First, it is clear that the Equal Protection Clause applies in these cases. The plain language of the Fourteenth Amendment and prior decisions of this Court establish that, with limited exceptions not applicable here, all persons physically present within the territorial boundaries of a State are entitled to the equal protection of its laws. To hold that the Equal Protection Clause does not apply to undocumented aliens would countenance intolerable discrimination by the States. In addition, application of the Clause would not have sweeping consequences; the fact that undocumented aliens are protected does not mean that they "must be placed in a single homogeneous legal classification" with citizens for all purposes. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

Furthermore, the Texas statute[2] should be subjected to strict judicial review under the Equal Protection Clause, both because it deprives undocumented children of a fundamental right—access to basic education—and because it discriminates against them on the basis of their national origin.

But even if the rational basis test is the appropriate standard, the Texas statute must fall. It cannot be defended as an intentional effort to establish additional disincentives to illegal immigration. Regulation of immigration is an exclusively federal function into which the States may not intrude. Even if regulation of immigration were a permissible State purpose, Section 21.031

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[2] Tex. Educ. Code Ann. tit. 2, § 21.031.

cannot withstand scrutiny because it bears too attenuated a relationship to the causes of illegal immigration. The statute also violates the Equal Protection Clause by attempting to compel acceptable parental behavior by punishing their children.

Section 21.031 improperly relies upon a child's nominal federal immigration status as a test of eligibility for education. Under federal law, undocumented status is not a litmus test for determining whether a child is deportable or ultimately will be permitted to reside permanently in the United States. In addition, Texas officials lack the institutional competence to make predictions as to the likely operation of federal law.

Nor can Section 21.031 be justified as an attempt to preserve the State's fiscal integrity. Texas has failed to articulate any valid reason for its distinction between two groups of students—undocumented children and citizen children or legally resident aliens—who are similarly situated for its purposes. Furthermore, Texas' implicit encouragement of illegal migration, by its policy on employment of undocumented aliens, is fundamentally inconsistent with its effort to deny education to those workers' children on the ground that their presence here is improper. This is especially true here, because the undocumented workers contribute to the support of the public schools on the same basis as other taxpayers.

Appellees do not seek, and a decision in their favor would not establish, a general right for undocumented aliens to participate in all State social benefit programs. Nor would it lead to invalidation of all State alienage laws. Rather, any challenges to such other provisions must be determined on a case-by-case basis, depending on such factors as the nature of the particular service involved, how it is financed, the statutory context in which the challenged law appears, and the personal responsibility of those who are excluded for immigration violations.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE APPLIES TO UNDOCUMENTED ALIENS.

The language of the Fourteenth Amendment and prior decisions of this Court demonstrate that the Equal Protection Clause applies even to aliens who unlawfully entered the United States.

By its terms, the Equal Protection Clause applies to "any person . . . within [the] jurisdiction" of a State.[3] The plaintiffs are natural persons. They reside within the territorial jurisdiction of the State of Texas and are subject to its civil and criminal laws. Under the plain language of the Equal Protection Clause, they are entitled to its protection.[4]

Although this Court has not explicitly resolved the question, its prior decisions support the proposition that undocumented aliens are entitled to equal protection. For instance, in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Court stated:

> "The Fourteenth Amendment . . . is not confined to the protection of citizens . . . . These provisions [the

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[3] Section I of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] The legislative history of the Fourteenth Amendment and the civil rights statutes enacted contemporaneously with it also indicate that undocumented aliens are covered by the Equal Protection Clause. *See* 36 Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866) (Sen. Howard); 42 Cong. Globe, 41st Cong., 2d Sess. 1536 (Feb. 24, 1870) (Sen. Stewart).

> Due Process and Equal Protection Clauses] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court." [5]

The Court's construction of the Citizenship Clause of Section I of the Fourteenth Amendment reinforces its conclusion in *Yick Wo*. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court held that the phrase "subject to its jurisdiction," within the Citizenship Clause, was a term of art intended to denote all persons physically present within the territorial borders of the United States except diplomats and other official representatives of foreign countries who, although physically present here, remain subject to the jurisdiction of their sovereign. The Court also concluded that the phrase "within its [a State's] jurisdiction" in the Equal Protection Clause is similar in meaning to the comparable jurisdictional provision of the Citizenship Clause. *Id.* at 687.[6] Plaintiffs are not official foreign representatives;

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[5] *Accord, Wong Wing v. United States*, 163 U.S. 228 (1896) (aliens unlawfully present in the United States are "persons" entitled to the protection of the Due Process Clause of the Fifth Amendment).

Other courts have found that the Equal Protection Clause applies to undocumented aliens. *See, e.g., Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) (Friendly, J.) (Equal Protection Clause applies "even to aliens whose presence here is illegal"); *Holley v. Lavine*, 529 F.2d 1294 (2d Cir.) (*per curiam*), *cert. denied*, 426 U.S. 954 (1976).

[6] The Court stated:

> "It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth

therefore, under the logic of *Wong Kim Ark*, they are within the jurisdiction of Texas and entitled to equal protection of its laws.

Prior decisions construing the Due Process Clause also show that undocumented aliens are entitled to equal protection. This Court long has held that even aliens whose presence here is unlawful are "persons" protected by the Due Process Clause.[7] Texas has failed to cite any portion of the legislative history of the Fourteenth Amendment which suggests that Congress intended to use the word "person" in a narrower sense in the Equal Protection Clause.

The language of other parts of the Fourteenth Amendment confirms that the Equal Protection Clause extends to undocumented aliens. The Privileges and Immunities Clause, part of the same sentence in Section I as the Equal Protection Clause, applies not to "any person" but to "citizens of the United States." Congress selected the term "persons," with its correspondingly broader meaning, rather than "citizens" in the Equal Protection Clause. *See Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). Similarly, Section II of the Fourteenth Amendment requires the apportionment of seats in the House of Representatives according to "the whole number of persons in each State, ex-

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Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction of the United States.'" 169 U.S. at 687.

[7] *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (the Due Process Clauses of the Fifth and Fourteenth Amendments protect "[e]ven one whose presence in this country is unlawful . . . ."); *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

cluding Indians not taxed." [8] The legislative history of Section II indicates that Congress considered and rejected proposals to adopt narrower terms, such as "voters" and "citizens," with full knowledge that use of the term "person" would result in representation based in part on the relative distribution of unnaturalized aliens and other individuals not authorized to vote by the States.[9] Read as a whole, the Fourteenth Amendment thus demonstrates that the Equal Protection Clause applies to all persons, regardless of their immigration status.

Texas' primary objection to application of the Equal Protection Clause to undocumented aliens is not a constitutional argument based on the language and legislative history of the Fourteenth Amendment. Rather, it is a practical concern that undocumented aliens would, if covered, automatically become eligible for many social services. But a decision that the Equal Protection Clause does not apply to these people would produce intolerable results. As the Fifth Circuit noted, absent the protection of the Clause, a State could, for example, impose more severe penal sanctions on undocumented aliens for violation of its criminal laws. *Doe v. Plyler*, 628 F.2d at 456 & n.20.

On the other hand, the conclusion that undocumented aliens are protected by the Fourteenth Amendment does not establish their entitlement to receive any particular State benefit or determine the conditions a State consti-

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[8] This provision of Section II has been held to require the inclusion of undocumented aliens in the census for purposes of apportioning Congressional seats. *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980), *aff'd mem.*, No. 80-1246 (D.C. Cir., Nov. 6, 1980), *cert. denied*, 101 S. Ct. 1696 (1981).

[9] 36 Cong. Globe, 39th Cong., 1st Sess. 359 (Jan. 22, 1866) (Sen. Conkling).

tutionally may attach to its enjoyment.[10] A State may, in proper circumstances, adopt classifications denying benefits even to lawfully admitted aliens without violating the Equal Protection Clause.[11] The important issue is the kind of classifications States constitutionally may draw with respect to undocumented aliens, and under what conditions. As demonstrated below, that question can be answered only on a case-by-case basis, depending upon the appropriate standard of review and the specific State purposes allegedly advanced by the challenged legislation.

For these reasons, the Court should hold that all natural persons (except official foreign representatives) physically present in the United States, including aliens who entered the country unlawfully, are entitled to equal protection of the laws.

II. SECTION 21.031 SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY BECAUSE IT RESTRICTS THE EXERCISE OF A FUNDAMENTAL RIGHT AND IS BASED UPON AN INHERENTLY SUSPECT CLASSIFICATION.

We join with appellees and other supporting *amici* in urging that Section 21.031 be closely scrutinized because it absolutely deprives undocumented children of a fundamental right—access to a free, basic education. The statute also discriminates against the children on the

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[10] As the United States correctly noted, a decision that Section 21.031 is unconstitutional would not make undocumented aliens eligible for federal benefit programs from which Congress has excluded them. The Court recognized in *Mathews v. Diaz*, 426 U.S. at 79-80, 84-85, that Congress, in the exercise of its plenary authority over immigration, may draw distinctions between aliens and citizens that States are prohibited from making by the Equal Protection Clause.

[11] *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 73-75 (1979); *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978).

basis of a suspect classification—national origin. Because these arguments are developed at length by appellees, we address them only briefly.

The Court has long recognized the fundamental importance of education in our society. *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The permanent, debilitating effect upon the plaintiff children of total exclusion from education was conceded by Texas and amply demonstrated by the evidence at trial.[12] As the district court found in *Alien Children*,

> "[C]hildren who are excluded from school suffer great harm . . . .
>
> "The experts who testified on the effect of the exclusion on children unanimously agreed that the damage caused was severe . . . .
>
> "Other testimony by educational experts [demonstrated] that children excluded from school would be unable to acquire the formal literacy skills which permit progress within a society." 501 F. Supp. at 560, 561, 562.

The courts below also found that many of the excluded children are now or will become eligible to be permanent resident aliens (and thus ultimately citizens) and that Section 21.031 permanently will interfere with their ability to exercise basic political rights. *Id.* at 561. Accordingly, the Court should hold that basic education is a fundamental right and that the Texas statute, which absolutely denies undocumented children access to public education, must be strictly scrutinized.[13]

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[12] The parties agreed that "[a]ny school-age child is severely harmed by being denied access to an education." Uncontested Issue of Fact 14, Joint Pretrial Order, *In re Alien Children Education Litigation*, S.D. Tex., MDL No. 389, at 14a.

[13] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), is not to the contrary. The Court there explicitly did not decide whether a statute totally denying children access

Furthermore, Section 21.031 should be subjected to strict scrutiny because the classification is based on national origin. The necessary effect of Section 21.031 is to discriminate against persons of Mexican origin. Although persons of other nationalities may be affected, it is undisputed that the vast preponderance of the excluded children are of Mexican origin, historically a disfavored political minority in Texas. *See, e.g.*, Brief *Amici Curiae* of the National Education Association, *et al.* at 44-56.[14]

III. SECTION 21.031 IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW BECAUSE IT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE.

If, as we urge, the Court determines that heightened scrutiny is appropriate, there can be little question that Section 21.031 is unconstitutional. Texas conceded before the Fifth Circuit, and appellees have shown convincingly, that the statute does not bear a close relationship to an important State purpose.[15] Even if the Court de-

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to a free, basic education should be subjected to strict scrutiny. *Id.* at 25 n.60. The Texas statute there at issue did not deny any child access to education but simply determined the relative allocation of State financial support among various school districts.

[14] Even if the Court determines that strict scrutiny is not appropriate, Section 21.031 nevertheless should be subjected to heightened judicial review. The statute creates an alienage-based classification, a kind of distinction which this Court has held requires close scrutiny because of the political powerlessness of this discrete and insular minority. *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Moreover, the statute penalizes children for their parents' alleged actions. In striking down a statute which penalized illegitimate children, this Court noted that where "children can affect neither their parents' conduct nor their own status," the Equal Protection Clause "requires more than the mere incantation of a proper state purpose." *Trimble v. Gordon*, 430 U.S. 762, 769, 770 (1977).

[15] "[T]here is no question that under a strict scrutiny standard, either through the concept of fundamental right of education or

cides that heightened scrutiny is not appropriate, however, the statute nonetheless should be held unconstitutional, because it bears no rational relationship to any legitimate State purpose.

After advocating various theories below, Texas' counsel have suggested in this Court that Section 21.031 was enacted to assist federal immigration authorities, by reducing incentives for illegal immigration, and to preserve the State's fiscal integrity. However, as Texas has conceded, there is no legislative history setting forth the legislature's motivation or purposes in adopting the statute.[16] Texas school officials admitted at trial that there had been no advance assessment of the need for or the likely impact of the statute.[17] Thus, the statute must be defended on the *post hoc* rationalizations of its counsel.

Even if Texas' asserted goals of deterring illegal immigration and preserving its financial resources were legitimate, excluding the plaintiff children from the public schools is an unconstitutional means of achieving those goals. In addition, the irrationality of the means employed by the State constitutes strong evidence that the

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of disadvantaging children or of suspect classifications of alienage, that the statute in Texas must fall." Brief of the State of Texas and Texas Education Agency in *In re Alien Children Education Litigation*, No. 80-1807, C.A. 5, at 14.

[16] *See* Joint Pre-Trial Order, Uncontested Issue of Fact 6 ("The parties have not been able to locate any written legislative history concerning Section 21.031. . . .").

[17] *See, e.g., In re Alien Children Education Litigation*, 501 F. Supp. at 574. Prior to its amendment in 1975, Section 21.031 did not exclude undocumented children from the public schools. Indeed, the Attorney General of Texas concluded that local school districts were without power to exclude undocumented aliens. He further indicated that such an exclusionary provision would be of questionable validity under the Equal Protection Clause. *See* Attorney General Opinion No. H-586, April 18, 1975, Plaintiffs' Exhibit No. 2 in *In re Alien Children Education Litigation*.

Texas legislature did not enact the statute to further the benign goals now suggested by its counsel.[18]

A. Section 21.031 Cannot Be Justified As An Attempt To Create Disincentives To Illegal Immigration.

The Texas statute cannot be justified as an attempt to regulate immigration or to create additional disincentives to illegal immigration. A State may not constitutionally legislate for these purposes; any statute actually having these effects is void under the Supremacy Clause. In any event, as the courts below correctly concluded, Section 21.031 bears such an attenuated relationship to deterring illegal immigration that it cannot be sustained on this ground. Moreover, the statute improperly relies upon a child's federal immigration status as the standard for admission to school.

1. *Texas May Not Defend Section 21.031 As An Attempt To Deter Illegal Immigration.*

Section 21.031 does not bear a reasonable relationship to a legitimate *State* purpose and thus cannot withstand scrutiny under the Equal Protection Clause. Texas may not justify its statute merely by adopting a federal purpose as its own. If a State "wishes to borrow a federal classification, it must seek to rationalize the distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction may be rationalized for the purpose for which Congress used it."[19] As the court below correctly observed,

> "The State's use of a federal classification does not automatically validate [the statute]. A State may

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[18] *See, e.g., Department of Agriculture v. Moreno*, 413 U.S. 528, 536-37 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

[19] *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy, J., concurring).

> incorporate a federal classification into its own laws; however, the State's use of the distinction must meet the appropriate equal protection standard, whether it be rational basis or strict scrutiny." *Doe v. Plyler*, 628 F.2d at 460 n.31.

Thus, Texas may not justify an otherwise arbitrary classification on the basis of federal distinctions between documented and undocumented aliens.[20] The State must articulate its own independent purposes for the law.

The creation of additional disincentives to illegal immigration is not a legitimate object of State legislation. The regulation of immigration and naturalization is an exclusively federal function into which the States may not intrude.[21] Since the federal power in this area is plenary, any State statute intended to affect the flow of immigration, even a statute supportive of the federal program, is invalid under the Supremacy Clause. Indeed, as the United States noted in its Brief, Section 21.031 necessarily would be void under the Supremacy Clause if it had more than a speculative and indirect impact upon immigration.[22] Thus, Texas cannot legitimately defend Section 21.031 for equal protection pur-

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[20] *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977); *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976).

[21] *E.g., DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941); *see also Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931). The exclusive right of the federal government to regulate immigration was well established even prior to the enactment of the first national laws restricting foreign migration. *See, e.g., Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Passenger Cases*, 7 How. (48 U.S.) 283 (1849); 1 Gordon & Rosenfield, *Immigration Law and Procedure*, § 1.5 at 1-33 (1980).

[22] We believe the United States formulated the correct test (Br. at 14): The Texas statute can survive the Supremacy Clause only if it [1] "is intended to deal with local problems caused by illegal immigration" and [2] "has not been shown to have any more than a speculative and indirect incremental impact on immigration . . . ."

poses as a deterrent to illegal immigration—even assuming denying undocumented children an education were a rational method of immigration control.

DeCanas v. Bica, 424 U.S. 351 (1976), provides no support for Texas' position. California did not attempt to defend its statute as a deterrent to illegal immigration. Instead, it relied on a proper and independent State purpose—the preservation of employment opportunities for its own citizens and legal residents. The Court based its preemption decision on the finding that the statute was not directed at regulation of immigration. 424 U.S. at 355-56.[23] Thus, as the United States properly observed (Br. at 13-14), *DeCanas* cannot be interpreted as authorizing State statutes intended to deter illegal immigration.

2. *Section 21.031 Bears Such An Attenuated And Speculative Relationship To Deterrence Of Illegal Immigration That It Cannot Provide A Rational Basis For Discrimination Against Undocumented Aliens.*

Even if the deterrence of illegal immigration were a permissible State purpose, Section 21.031 could not be upheld on that basis because it bears such an attenuated relationship to the causes of that immigration.

The evidence adduced in the district courts demonstrates overwhelmingly that the availability of employment opportunities is the principal motivation for illegal immigration.[24] The record shows that the vast majority

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[23] Contrary to Texas' contention, the Court did not consider the validity of the California statute under the Equal Protection Clause; the only question raised in the case was the operation of the Supremacy Clause.

[24] *Doe v. Plyler*, 628 F.2d at 451, 461. All major studies have concluded that the availability of jobs prompts immigration by undocumented aliens. Since the decision below, similar conclusions have been reached in two major reports issued by the federal Commission charged with recommending amendments to the immigration laws. *See, e.g., U.S. Immigration Policy and the National*

of undocumented immigrants are young, single, and seeking employment.[25] Texas, however, does not prohibit employment of undocumented aliens. Furthermore, as the courts below found, access to public education for their children is an insignificant causative factor in the immigration of undocumented workers to Texas.[26] The record also shows that only a minute fraction of undocumented workers ever bring their children to the United States.[27] Thus, the Fifth Circuit correctly decided that Section 21.031 bears only the most attenuated and ineffectual relationship to immigration control.

The effect of the Texas statute is further attenuated because it is not directed at the persons who make the decision to immigrate—the parents. Although Texas in-

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Interest, Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy (March 1981), at 36 ("[a]ll studies indicate that undocumented/illegal aliens are attracted to this country by U.S. employment opportunities"), 59 ("[t]he vast majority of undocumented/illegal aliens are attracted to this country by employment opportunities"). *See* Staff Report of the Select Commission on Immigration and Refugee Policy 490-91 (April 1981). *See* n.26 below.

[25] *See Doe v. Plyler*, 628 F.2d at 460-61.

[26] *See, e.g., Doe v. Plyler*, 628 F.2d at 460-61; *id.*, 458 F. Supp. at 585 ("[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration . . ."); *In re Alien Children Education Litigation*, 501 F. Supp. at 578 ("the evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not education benefits . . . . There was overwhelming evidence . . . of the unimportance of public education as a stimulus for immigration.").

Texas seeks to reargue this factual issue in this Court (Br. at 28-30), relying on language in the concurring opinion in *Doe v. Wright*, 648 F.2d 432, 439 (5th Cir. 1981) (Reavley and Clark, JJ., concurring). That concurring opinion, however, does not appear to have been based upon review of a factual record.

[27] *See Doe v. Plyler*, 628 F.2d at 460-61; *In re Alien Children Education Litigation*, 501 F. Supp. at 578 n.83.

tends to affect parental behavior, Section 21.031 punishes their children, innocent victims who bear no responsibility for the parents' decision to immigrate.[28] The children cannot modify their parents' residence in order to avoid punishment. Even under the rational basis standard, this generation-skipping impact renders Section 21.031 unconstitutional. This Court's decisions establish that the Equal Protection Clause will not tolerate a State effort to compel acceptable behavior from parents by imposing disabilities on their children in this fashion.[29]

Furthermore, Section 21.031 violates the Equal Protection Clause because it employs an eligibility test, the child's federal immigration status, which does not bear a rational relationship to the ultimate question whether the child will be permitted to remain permanently in the United States.[30] Section 21.031 permits citizens and "legally admitted aliens" to attend the public schools. But undocumented status is not a litmus test for deportability under federal law. Texas, however, improperly relies on this status as determinative of a child's deportability and thus his ineligibility to attend school.

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[28] *In re Alien Children Education Litigation*, 501 F. Supp. at 582-73; *Doe v. Plyler*, 458 F. Supp. at 582. Texas has conceded that it is "aware of no instance in which undocumented alien children have come to the United States not accompanied by their parents." Joint Pretrial Order, Uncontested Issue of Fact 17.

[29] *E.g.*, *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972).

[30] The Brief of the United States did not consider whether Texas' reliance on the child's immigration status was rationally related to a proper State purpose. The United States addressed only the preliminary question whether Texas' incorporation of the federal classification was preempted by the Supremacy Clause and argued that it was not, in certain narrow circumstances (Br. at 16 n.1). In so concluding, the United States made critical assumptions about how Section 21.031 is interpreted and applied (Br. at 16). The United States failed, however, to cite any record support to demonstrate that the statute actually is implemented in the manner it suggests is necessary in order to avoid conflict with federal law.

Undocumented status does not, by itself, provide an objective measure of whether a person is deportable or will ever be deported. A person who enters the United States without documentation may be expelled only pursuant to a formal deportation order issued after a federal administrative proceeding. At the hearing, the alien is entitled to substantial due process rights, and the government bears the burden of proving he is deportable by clear, convincing and unequivocal evidence.[31]

The immigration laws afford undocumented aliens many avenues for relief which may allow them to remain permanently in the United States.[32] For example, 8 U.S.C. § 1153 (1976), establishes preference categories for admission of aliens who have specified family relationships to adult citizens. The INS may decide not to pursue proceedings against an undocumented alien under its "deferred action" program.[33] And even if a person has been formally determined to be deportable, he may peti-

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[31] 8 U.S.C. § 1252(b) (1976); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (due process); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (burden of proof).

[32] Thus, an alien may petition the Attorney General for adjustment in immigration status, 8 U.S.C. § 1255 (1976); suspension of deportation and adjustment of status to that of an alien lawfully admitted for permanent residence, *id.*, § 1254(a) (1976); or withholding of deportation because of concern that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion, *id.*, § 1253(h), *as amended*. The decision whether to grant adjustment of status is committed to the discretion of the Attorney General; his decisions are the product of weighing complex equitable considerations. *See INS v. Wang*, 450 U.S. 139 (1981) (*per curiam*). Texas officials plainly cannot predict, with any degree of certainty, the outcome of the Attorney General's decision.

[33] The principles governing the "deferred action" program are set forth in INS Operations Instructions 103.1(a)(1)(ii) (issued April 30, 1975). Among the factors arguing for deferral are "tender age," "long residence in the U.S.," and a "family situation that would be affected by expulsion." *Id. See* 1A Gordon & Rosenfield, *Immigration Law and Procedure*, § 5.3e, at 5-48 to 5-52.

tion under 8 U.S.C. § 1254(a) for suspension of deportation and adjustment to permanent resident status if he has been physically present in the United States for at least seven years and his deportation would, in the Attorney General's opinion, result in "extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States . . . ."[34] In addition, the Administration has proposed a wholesale immigration amnesty plan which could, if adopted, lead to the adjustment of status of many of these children. *See* p. 26 n. 46 below.

As the district courts found, many of the undocumented children affected by Section 21.031 currently are eligible to or ultimately will become documentable as permanent resident aliens.[35] The children and their families have developed close ties to society; in many instances, they would have strong equitable arguments for favorable treatment. For example, three of the four plaintiffs in *Doe v. Plyler* have resided in the United States for more than ten years, and each plaintiff has at least one child who is undocumented and one or more children who are United States citizens.[36] Even if the government successfully initiated deportation proceedings, these persons would, under established federal prac-

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[34] *See* 2 Gordon & Rosenfield, *Immigration Law and Procedure*, § 7.9d, at 7-164.3-.6, for a detailed discussion of the factors considered by the INS in these decisions.

The decision in *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3211 (October 5, 1981), involving the constitutionality of the one-house veto provision of Section 1254(c), will not affect the essential point that the immigration law contains numerous ameliorative provisions.

[35] *Doe v. Plyler*, 458 F. Supp. at 581 & n.14; *In re Alien Children Education Litigation*, 501 F. Supp. at 559 & n.23. Texas has conceded that "[s]ome undocumented children residing in the State of Texas are documentable." Joint Pre-Trial Order, Uncontested Issue of Fact 7.

[36] *Doe v. Plyler*, Transcript of September 9, 1977 Hearing at 53, 57, 90, 96, 104-05, 120, 122.

tice, have strong claims for deferred action or for suspension of deportation and adjustment to permanent resident status. After reviewing substantial testimony on the operation of the federal immigration laws and the status of the plaintiffs, the courts below concluded that these undocumented children and their parents are, for all practical purposes, permanently present in the United States.

While Section 21.031 thus excludes children who are currently documentable, the statute also is plainly underinclusive. It does not exclude children of parents who may be subject to expulsion for violation of one of the many other deportation provisions besides the prohibition of illegal entry.[37] Persons who enter the United States lawfully but thereafter become subject to deportation are similarly situated to unlawful entrants for both federal immigration and State purposes. The Texas statute, however, does not apply to these other classes of deportable aliens, even though, for example, "[v]isa abusers are more likely to have children enrolled in U.S. schools (7.1 percent) than persons entering without documentation (2.2 percent)."[38]

In sum, Section 21.031 bears no rational relationship to federal immigration law because it denies undocumented children an education on the basis of the presumed outcome of a hypothetical federal hearing. That proceeding may never be held and might not ultimately determine whether a child will be allowed to reside per-

[37] For example, a lawfully admitted alien is subject to deportation if he violates the terms of his admission, 8 U.S.C. § 1251(a)(9) (1976), becomes institutionalized within five years at public expense for mental disease, *id.*, § 1251(a)(3), is convicted of crimes involving moral turpitude, *id.*, § 1251(a)(4), becomes an anarchist or subversive, *id.*, § 1251(a)(6), becomes a public charge within five years from causes not arising after entry, *id.*, § 1251(a)(8), or becomes a narcotic drug addict, *id.*, § 1251(a)(11).

[38] *Illegal Aliens: Estimating Their Impact on the United States*, Report to the Congress by the Comptroller General, PAD-80-22, 25 (March 14, 1980).

manently in the United States. In light of the complexity of the immigration statute and their lack of specialized competence in this area, Texas officials are not qualified to predict the likely operation of federal law.[39] In these circumstances, it is irrational for Texas to rely upon a child's apparent immigration status to determine whether he should be permitted to attend school.

B. The Texas Statute Impermissibly Discriminates Between Identical Groups Of Students Solely For The Purpose Of Saving Money.

The only other justification proffered by Texas' counsel is that Section 21.031 allegedly preserves the State's financial resources. As a general proposition, Texas has a valid interest in limiting its expenditures, but the approach it has adopted—completely denying education to children whose parents have long supported the public schools—violates the Equal Protection Clause.

Texas' desire to limit expenditures cannot, of itself, constitutionally justify a classification that excludes these children. As the Court concluded in *Graham v. Richardson*, 403 U.S. 365, 376 (1971), such an argument proves too much because it could be used to justify any classification which saved money, no matter how invidious—such as a law denying education to all chil-

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[39] *See, e.g., U.S. Immigration Policy and the National Interest, supra,* at 256-57.

We believe the unconstitutionality of Section 21.031 is implicit in the Solicitor General's argument (Br. 16 n.1) that Texas cannot, consistent with the Supremacy Clause, base eligibility for education on its own determination whether an alien has overstayed his visa or otherwise is deportable. As previously demonstrated, the fact of undocumented entry does not provide an objective litmus test for determining a person's deportability. The same deportation statute and procedures apply to both the illegal entrant and one who otherwise is deportable. Accordingly, it follows that the Constitution also forbids States from denying access to education on the basis of its assumptions about the consequences of a person's undocumented status under federal law.

dren born in 1970.[40] A State, of course, legitimately may seek to conserve its tax revenues. But where, as here, the State attempts to do so by denying eligibility to a discrete class of persons, the Equal Protection Clause requires that the State at least articulate a rational basis for distinguishing between the privileged and disfavored groups. Texas has failed to do so.[41]

The undocumented children are constitutionally indistinguishable for State purposes from other children Texas allows to attend its public schools. All the excluded children live in Texas. Many of them are now or will become documentable in the future. Texas has conceded that the parents of undocumented children contribute to the support of the school system on the same basis as other residents, through payment of State and local taxes.[42] Moreover, while Texas makes much of the

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[40] *Accord, Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

[41] Texas and certain border school districts have renewed in this Court arguments about the anticipated burden of educating undocumented children. However, Texas Governor William P. Clements Jr., recently stated that concern for the cost of educating these children had been "vastly overblown in the first place" and that they could be educated without "serious difficulty." He also noted that less than 11,000 undocumented children actually have enrolled while the stay of Section 21.031 pending appeal has been in force. *N.Y. Times*, September 22, 1981, p. A22 col. 1.

[42] Joint Pre-Trial Order, Uncontested Issue of Fact. The district court in *Alien Children* found that

> "undocumented aliens contribute to government revenues to the same extent as others with similar income. . . . The public school education in Texas is financed primarily through sales taxes and *ad valorem* property taxes. Undocumented aliens are unable to escape the payment of those taxes; they buy consumer goods and they indirectly contribute property tax revenue through the payment of rent." 501 F. Supp. at 570-71.

Because the parents contribute on the same basis as other taxpayers to the support of the Texas school system, this case is distinguishable from *Moreno v. University of Maryland*, 645 F.2d 217

allegedly greater education burden imposed by undocumented alien children, particularly their need for bilingual education, the educational needs of these children are indistinguishable from those of legally resident aliens, who Texas concedes are entitled to attend its schools.[43] As the district court found in *Alien Children*,

> "Like resident alien children, undocumented children are more likely to need bilingual education. Like resident alien children, many undocumented children do not need bilingual education. Indeed, many undocumented children previously have attended schools in other states." 501 F. Supp. at 583 n.104 (citation omitted).

Accordingly, there is no distinction between undocumented children and those allowed to attend school other than their federal immigration status. As demonstrated above, immigration status by itself is not a permissible basis for the State to exclude children from school. Therefore, the district court in *Alien Children* correctly concluded that, since "undocumented children are otherwise similarly situated to the other children in the State," Section 21.031 "is *wholly irrelevant* to the achievement of the State's objective" of conserving funds. 501 F. Supp. at 583 (emphasis added).[44]

(4th Cir. 1981), *cert. granted sub nom. Toll v. Moreno*, 50 U.S.L.W. 3215 (Oct. 5, 1981). Also, unlike the in-state tuition rule involved in *Toll*, the Texas statute unconstitutionally discriminates between noncitizens of Texas and aliens. *See* n.44 below.

[43] Texas has conceded that "[w]hether or not a student needs bilingual education is a function of their [sic] ability to read, write and speak English and not of their immigration status." Joint Pre-Trial Order, Uncontested Issue of Fact 15.

[44] Decisions such as *Vlandis v. Kline*, 412 U.S. 441 (1973), indicate that Texas properly might seek to limit free public education to those who have manifested some degree of attachment to the State. Texas has not raised the point, but in any event it could not sustain the statute. Texas has extended a virtually unqualified right to free public education to United States citizens who cur-

The irrationality of Section 21.031 is further demonstrated when the statute is considered in the context of Texas' overall position with respect to undocumented aliens. Texas, unlike California and 10 other States, has chosen not to prohibit knowing employment of undocumented aliens. Its legislature on several occasions has refused to adopt such legislation. As an inevitable consequence of Texas' policy, undocumented aliens have for many years formed an important part of its blue collar and agricultural labor force. Indeed, powerful economic interests in the State have raised strong objections to any law that would deny them access to this large labor pool.[45] Thus, Texas fairly can be said to have encouraged

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rently live in Texas but who are not citizens of Texas. Tex. Educ. Code Ann. tit. 2, § 21.031(d). As long as the student or his parents do not move to Texas for the "primary purpose" of attending its public schools, the child is entitled to a free public education, regardless whether his parents previously have helped support the schools or the length or degree of their attachment to the State. *See Arredondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981). Children of undocumented aliens, however, are excluded from the schools, even though they may have established a more permanent relationship to the State than non-domiciliary residents and have contributed for many years to the financial support of the educational system.

Texas has no proper constitutional justification for treating persons who are citizens of another State differently from persons who are citizens of another country. *Mathews v. Diaz*, 426 U.S. at 85. Indeed, Section 21.031 is irrational *a fortiori* under *Diaz* because it gives preferential treatment to strangers, with no prior relationship to the State, and punishes persons who have long supported State programs through taxation.

[45] In 1952, for example, the Texas Congressional delegation was instrumental in obtaining enactment of the so-called "Texas Proviso," which eliminated an employment prohibition from the criminal harboring provision of the immigration laws. *See, e.g., Illegal Aliens: Analysis and Background*, Study prepared for the use of the House Committee on the Judiciary, 95th Cong., 1st Sess. 28 (1977). *See generally Sin Papeles: The Undocumented in Texas*, Report of the Texas Advisory Committee to the United States Commission on Civil Rights (January 1980).

illegal immigration across its Mexican border by its deliberate policy.

Against this background, Texas' effort to ban undocumented children from its schools is arbitrary and capricious. The State has attempted to treat the undocumented in a fundamentally contradictory fashion. It first encourages their presence to support its economy. Once they are here, Texas penalizes undocumented children in a way that conveniently minimizes its monetary outlays, while preserving to the State the full benefits of their parents' labor. Under the Equal Protection Clause, Texas cannot seek to conserve its funds by treating the undocumented in such an obviously inconsistent fashion—especially since the undocumented pay taxes to support the very educational system from which their children are excluded.

CONCLUSION

Texas' frustration in dealing with the illegal immigration problem is understandable. Largely because of Congressional inaction, it, along with the other border States, has borne the brunt of the current wave of immigration. But the absence of federal action does not suspend the application of the Equal Protection Clause. Texas still must articulate a permissible basis for distinguishing between those eligible and those ineligible to receive free public education—particularly when those to whom it seeks to deny education have contributed a proportionate share to finance the service.

The ultimate solution for the complex social and political questions surrounding illegal immigration must be provided by the Congress. The nationwide scope of the problem and its possible impact on our international

relations demand comprehensive federal action.[46] Regardless whether federal action is forthcoming, however, the Constitution will not tolerate Texas' attempt to save money by imposing disabilities on innocent victims—the children—in an arbitrary and contradictory manner. In practical terms, Texas asks the Court to sanction the creation of a permanent underclass of immigrant laborers, outside the protection of the Constitution and without hope of receiving the education they need to progress in this society. It is an invitation the Court should decline.

For the reasons stated above, the judgments should be affirmed.

Respectfully submitted,

DANIEL MARCUS
Attorney of Record
JOHN F. COONEY
CRAIG J. BLAKELEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Counsel for Amici Curiae

October 27, 1981

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[46] Congress has studied the problem of illegal immigration extensively in recent years. In 1978, it established the Select Commission on Immigration and Refugee Policy to evaluate existing laws and recommend improvements. Pub. L. 95-412, 92 Stat. 908 (1978). The last two Administrations have proposed remedial plans designed in part to assist Texas. *E.g.*, the Alien Adjustment and Employment Act of 1977, H.R. 9531, 95th Cong., 1st Sess. (Oct. 12, 1977) and S. 2252, 95th Cong., 1st Sess. (October 28, 1977); *U.S. Immigration and Refugee Policy*, Statement by President Reagan (July 30, 1981). In particular, Congress recently has considered bills which would provide federal reimbursement for State expenditures for undocumented alien children they are required to educate by federal court order. *See* H.R. Bill No. 8053, 96th Cong., 2d Sess. (Aug. 28, 1980), introduced by Mr. Mattox of Texas on behalf of himself and seven other Representatives.

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Nos. 80-1538 and 80-1934

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, ET AL., APPELLANTS

v.

J. and R. DOE, AS GUARDIANS AD LITEM FOR I. DOE, ET AL.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
APPELLANTS

v.

CERTAIN NAMED and UNNAMED UNDOCUMENTED
ALIEN CHILDREN

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN NO. 80-1538 AND BRIEF FOR THE UNITED STATES IN NO. 80-1934

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 21.031 of the Texas Education Code, which permits local school districts to exclude from their public schools alien children who were not "legally admitted" into the United States or to charge tuition for the admission of such children, is invalid under the Supremacy Clause of the Constitution because it intrudes upon the exclusive authority of the federal government to regulate immigration or because it is pre-empted by the Immigration and Nationality Act or Title I of the Elementary and Secondary Education Act.

2. Whether an alien who entered the United States in violation of federal immigration laws and is present in a state is a person within the jurisdiction of the state within the meaning of the Equal Protection Clause of the Fourteenth amendment.*

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* Appellants have also presented the question whether, assuming that aliens who entered the United States in violation of federal immigration laws are persons protected by the Equal Protection Clause, Section 21.031 of the Texas Education Code is invalid under that Clause. The United States does not address that question.

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OPINIONS BELOW

The opinion of the court of appeals in No. 80-1538 (J.S. App. A-1 to A-32) is reported at 628 F.2d 448, and the opinion of the district court in No. 80-1538 (J.S. App. A-35 to A-82) is reported at 458 F. Supp. 569. The court of appeals' order of summary affirmance in

No. 80-1934 (J.S. App. 9) is unreported, and the opinion of the district court in No. 80-1934 (J.S. App. 19-110) is reported at 501 F. Supp. 544.

JURISDICTION

The judgment of the court of appeals in No. 80-1538 was entered on October 20, 1980, and the petition for rehearing was denied on November 17, 1980. J.S. App. A-31. The notice of appeal in No. 80-1538 was filed on December 18, 1980, and the appeal was docketed as of February 12, 1981. The order of summary affirmance in No. 80-1934 was entered on February 23, 1981, and a notice of appeal and an amended notice of appeal were filed on March 2 and March 13, 1981, respectively. The appeal in No. 80-1934 was docketed as of May 8, 1981. In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(2).

STATEMENT

In May 1975, the Texas legislature revised its education laws to permit local school districts to deny enrollment in their public schools to alien children who were not "legally admitted" into the United States or to charge tuition for the admission of such children. The 1975 revision also withholds from local school districts any state funds for the education of alien children who were not legally admitted into the country. Tex. Educ. Code Ann. tit. 2, § 21.031 (Vernon Cum. Supp. 1980). These two cases involve challenges to the authority of the State of Texas not to bear the expense of educating alien children who entered the United States in violation of the immigration laws and to permit local school districts to exclude these children from public school or to charge tuition for their admission.

A. *Plyler* v. *Doe*

This action was filed in the United States District Court for the Eastern District of Texas on September 16, 1977, by parents of alien children residing in Tyler, Texas, who did not have documentation of lawful admis-

sion into the United States. The case was brought as a class action on behalf of all similarly situated alien children in Tyler (Compl. 6-7). The complaint named as defendants the Superintendent and members of the Board of Trustees of the Tyler Independent School District (*id.* at 14).

The complaint alleged that the School District's implementation of Section 21.031 of the Texas Education Code resulted in the exclusion from the Tyler public schools of all members of the plaintiff class, denying plaintiffs' rights under the Equal Protection Clause and 42 U.S.C. (& Supp. III) 1983 and 42 U.S.C. 2000d. The complaint sought declaratory and injunctive relief (Compl. 8).

A hearing on plaintiffs' request for preliminary relief was held on September 9, 1977. The State of Texas intervened as a defendant at that hearing (Tr. 163). On September 12, 1977, the court preliminarily enjoined defendants from enforcing Section 21.031 to withhold a free education from the named plaintiffs.

After the case was certified as a class action (order of October 25, 1977), the court on December 12 and 16, 1977, held a hearing on plaintiffs' request for permanent relief. On September 14, 1978, the district court held that § 21.031, and the Tyler School District's implementation of it, violated plaintiffs' rights under the Equal Protection Clause, and that federal law preempted the state statute (J.S. App. A-35 to A-82). The court permanently enjoined defendants from enforcing § 21.031 to deny plaintiffs a tuition-free education (J.S. App. A-33).

Both the State of Texas and the Tyler Independent School District appealed. On October 20, 1980, the Fifth Circuit affirmed the district court's order. The court of appeals reversed the lower court's holding that § 21.031 is preempted by federal law (J.S. App. A-7 to A-14), but affirmed its holding that § 21.031 violates the equal protection rights of alien children who were not legally admitted into the United States (J.S. App. A-14 to A-30). Rehearing was denied on November 17, 1980 (J.S. App. A-31).

Both Texas and the School District appealed to this Court, and the Court noted probable jurisdiction on May 4, 1981.

B. *In re Alien Children*

During 1978 and 1979, suits challenging the constitutionality of § 21.031 and various local practices undertaken on the authority of that statutory provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas (J.S. App. 20-21). Each suit named as defendants the State of Texas and the Texas Education Agency, as well as local school officials.

In September 1979, about a year after the district court's ruling in *Plyler* v. *Doe*, *supra*, the State filed a motion with the Judicial Panel on Multidistrict Litigation (J.S. App. 21) to consolidate into one action all the other related cases that were pending in district courts in Texas but were not yet decided. On November 16, 1979, the panel consolidated all claims against the State and the Texas Education Agency into one action to be heard in the Southern District of Texas. The claims against local officials were retained in the districts in which the cases had been filed. On February 1, 1980, the district court for the Southern District of Texas granted the United States' motion to intervene as plaintiff in the consolidated action.

The hearing in this case was held between February 19 and March 27, 1980. On July 21, 1980, the district court entered an opinion and order holding that the portions of § 21.031 that denied undocumented alien children a state-supported education violated the Equal Protection Clause of the Fourteenth Amendment (J.S. App. 17-68).

While the appeal in this case was pending,[1] the court of appeals rendered its decision on the appeal in *Doe* v. *Plyler*. Apparently on the authority of that precedent,

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[1] On August 11, 1980, the court of appeals stayed the district court's order pending appeal. Justice Powell vacated the stay on September 4, 1980, No. A-179, 1979 Term.

the court of appeals, on February 23, 1981, summarily affirmed the district court's decision in the statewide case (J.S. App. 9).

The State of Texas appealed from the order of summary affirmance entered below, and this Court noted probable jurisdiction on June 15, 1981. The two cases have been consolidated for briefing and argument.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The interests of the United States in these cases are limited, and the coverage of this brief will be correspondingly limited. Of the three issues presented, the federal interests reach only the first two. The United States has an interest in the primacy of federal law dealing with matters of immigration and naturalization and in Congress' plenary authority to legislate in these areas. Similarly, because of implications for federal authority to enforce federal civil rights laws, the United States has an interest in the applicability of the Equal Protection Clause to persons who are physically, albeit illegally, within a state's jurisdiction. See, *e.g.*, *United States* v. *Otherson*, 637 F.2d 1276 (9th Cir. 1980), petition for cert. pending, No. 80-6548.

By contrast, whether the State of Texas is constitutionally obligated to bear the expense of educating school-age children who entered the United States in violation of federal law and whether local school districts are constitutionally required to admit such children to their public schools are issues that affect the State of Texas and the school districts, not the United States. Accordingly, the United States will leave to the parties directly affected the arguments concerning whether the Equal Protection Clause requires Texas to educate alien children who were not lawfully admitted into the United States.[3]

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[2] Because our argument is limited to the questions in the case of specific interest to the United States (see pages 5-6, *infra*), we do not here summarize the record.

[3] The United States has not participated in recent cases before this Court not involving the United States insofar as they concern

I

Section 21.031 of the Texas Education Code permits local school districts in Texas to charge tuition to chil-

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the rights of aliens under the Equal Protection Clause. See *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291 (1978); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976) (see Brief for the United States as Amicus Curiae, No. 74-1267, 1975 Term, at 2-3 n.1); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971).

In No. 80-1934, *In re Alien Children Education Litigation*, the United States intervened in the district court as a plaintiff, pursuant to 42 U.S.C. 2000h-2, contending that Section 21.031 of the Texas Education Code is invalid under the Equal Protection Clause. However, the complaint in intervention was based on the contention that § 21.031 discriminates on the basis of national origin, one of the forms of discrimination to which the Attorney General's authority under 42 U.S.C. 2000h-2 is addressed. The district court rejected that contention (80-1934 J.S. App. 54), and the government did not renew it in its motion for summary affirmance in the court of appeals in No. 80-1934; that motion was based on the Fifth Circuit's previous decision in No. 80-1538, *Plyler* v. *Doe*, which held § 21.031 invalid under the Equal Protection Clause by application of a rational basis test having nothing to do with national origin. 80-1538 J.S. App. A-24 to A-30. Indeed, the district court in No. 80-1538 observed that the claim of discrimination on the basis of national origin in that case had dropped out by the time of the trial on the merits. 80-1538 J.S. App. A-38 n.4. We do not, moreover, urge affirmance of either judgment below on the ground that § 21.031 invidiously discriminates on the basis of national origin. The original predicate for the United States' participation as a party in the case pursuant to 42 U.S.C. 2000h-2 therefore no longer obtains, because 42 U.S.C. 2000h-2 does not provide for intervention as of right where a party alleges a denial of equal protection on the basis of alienage or, as here, on the basis of an alien's status under the federal immigration laws. Accordingly, our current posture in No. 80-1934 is more that of an amicus curiae.

It is true that in No. 80-1538, *Plyler* v. *Doe*, the United States argued in its brief amicus curiae in the court of appeals that § 21.031 is invalid under the Equal Protection Clause because it invidiously discriminates against appellee children. However, consistent with our prior practice in alienage cases involving the states, and with our view that this is an issue that affects state rather than federal interests, we do not argue that point here.

dren who are neither citizens of the United States nor "legally admitted aliens" or to exclude them from the free public schools altogether. In our view, § 21.031 does not constitute constitutionally proscribed state regulation of immigration, a matter within the exclusive province of the federal government, and is not preempted by the Immigration and Nationality Act. We also conclude that § 21.031 is not preempted by or inconsistent with Title I of the Elementary and Secondary Education Act of 1965.

A. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power" (*De Canas* v. *Bica*, 424 U.S. 351, 354 (1976)), not every state statute that deals with aliens or treats them differently than citizens is a regulation of immigration and thus per se preempted. This Court's decision in *De Canas* v. *Bica* makes clear that a state statute that adopts for proper state purposes the federal standards for the legal entry of aliens into the United States does not constitute the regulation of immigration as such.

De Canas also disposes of any argument that § 21.031 is preempted by the Immigration and Nationality Act, at least insofar as the State of Texas and its local school districts look to *federal* law and administrative decisions in determining whether an alien has been "legally admitted." Here, as in *De Canas*, the state statute focuses upon the local effects of illegal immigration and concerns a subject matter—education—that traditionally has been a matter of paramount state concern. And here, as in *De Canas*, we are aware of no indication in the legislative history of the Immigration and Nationality Act of a congressional intent to preclude even harmonious state laws touching upon aliens in general or specifically upon the particular local effects of illegal immigration sought to be addressed by the state.

Although we are of the view that § 21.031 of the Texas Education Code is not preempted by the Immigration and Nationality Act, we would view quite differently a state law that excluded from public schools (or permitted the charging of tuition to) alien children who are *lawfully*

present in the United States as either immigrants or nonimmigrants. This issue could become relevant with respect to many of the alien children who are appellees in this case if Congress enacts the Administration's recent proposals for dealing with illegal immigration. Under one feature of these proposals, any alien who was present in the United States prior to January 1, 1980 in violation of the immigration laws could apply for a new status of "renewable term temporary resident" which, after a period of 10 years, would permit the alien to attain permanent resident status.

Finally, whatever restraints the Equal Protection Clause, standing alone, may impose on the states in excluding aliens (whether or not lawfully admitted into the United States) from state programs, it is clear that the Constitution does not impose comparable restraints on Congress. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976). In particular, the Court made clear in *Mathews* v. *Diaz* that Congress may exclude illegal entrants from participation in federal programs, and such aliens have been so excluded under a number of statutes and regulations.

B. Section 21.031 of the Texas Education Code also is not preempted by Title I of the Elementary and Secondary Education Act of 1965 (ESEA). That Act establishes a system of federal financial assistance to local educational agencies to supplement state and local funds used in the schooling of "educationally deprived" children.

Federal preemption of § 21.031 is not suggested by the nature of the subject matter involved, for, as Congress recognized in enacting the ESEA, education traditionally has been the province of the states rather than the federal government. Nor are we aware of any indication in the text or legislative history of Title I of the ESEA that Congress intended to preempt state standards for the admission of children to public schools or to require local school districts to admit undocumented alien children as a condition to the receipt of supplemental funds under Title I for educationally deprived children.

II

Aliens who have gained admission into the United States, whether legally or illegally, are "persons" within the contemplation of the Constitution. And where these aliens are present within the territorial boundaries of one of the states, they plainly are "within its jurisdiction" for purposes of the Equal Protection Clause of the Fourteenth Amendment. If the quoted phrase is used in a geographic sense, then obviously an alien present within the borders of a state is "within its jurisdiction." The result is the same if the quoted phrase is intended to bring within the protection of the Equal Protection Clause all those who are amenable to the laws of the state. The Equal Protection Clause simply affords a measure of protection to aliens present in violation of federal law when they *are* subjected to the operation of state law. Absent such coverage, a state might be free to discriminate against such aliens on the basis of their race or national origin or even to augment the penalties for violations of its generally applicable criminal laws by such aliens, imposing, for example, a maximum penalty of five years' imprisonment against such persons for committing an offense which carries a maximum three-year sentence when committed by anyone else.

Moreover, to conclude that an alien present in the United States in violation of federal law is not covered by the Equal Protection Clause might produce the anomalous result that such an alien is entitled to *less* protection from unequal treatment by a state than by the federal government, because an alien who is present in the United States in violation of the immigration laws plainly *is* a "person" for purposes of the Due Process Clause of the Fifth Amendment, including its equal protection component. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976). The United States has an interest in assuring the foreign nations of which aliens in this country are nationals that such aliens are protected by the Constitution when they are present in a state.

ARGUMENT

I. SECTION 21.031 OF THE TEXAS EDUCATION CODE IS NOT PREEMPTED BY CONGRESS' EXCLUSIVE AUTHORITY IN IMMIGRATION MATTERS OR BY FEDERAL LAWS AND TREATIES

Sections 21.031(b) and (c) of the Texas Education Code provide that only children who are citizens of the United States or "legally admitted aliens" are entitled to be admitted to the State's public free schools without charge. By operation of that section, local school districts may—but are not required to—either charge tuition to children who are neither citizens nor "legally admitted aliens" or exclude them from the free public schools altogether.[4]

Appellees argued in the courts below, and may well argue in this Court in support of the judgments below, that Section 21.031 of the Texas Education Code is invalid under the Supremacy Clause of the Constitution (Art. VI, cl. 2)[5] because it is a constitutionally impermissible regulation of immigration, a matter reserved exclusively to the federal government, and because it is inconsistent with federal laws and treaties. Of the

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[4] We shall discuss the preemption issues in this case by focusing on the practices of the local school districts, because that is where the Texas statute, as implemented, most directly affects the complainant children. If, as we submit, these local practices are not preempted by federal law, it necessarily follows that the State of Texas is not barred by federal statutes and treaties from allocating funds from the Available School Fund to its local school districts pursuant to § 21.031(a) in a manner that excludes such aliens from the formula on which the allocation is made and prohibits local school districts from applying allocated state funds for the aliens' benefit.

[5] The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

federal laws and treaties considered by the courts below, only the Immigration and Nationality Act and Title I of the Elementary and Secondary Education Act of 1965 need be considered at any length.[6]

A. Section 21.031 of the Texas Education Code is not, on Its Face, Inconsistent With the Exclusive Authority of Congress Over Immigration or With the Immigration and Nationality Act

For the reasons given below, we conclude that § 21.031 does not constitute state regulation of immigration, an area within the exclusive province of the federal government. Nor does that section, on its face, conflict with the Immigration and Nationality Act.

1. The Court reaffirmed in *De Canas* v. *Bica*, *supra*, that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." 424 U.S. at 354. But the Court stressed at the same time that a state statute is not necessarily a prohibited regulation of immigration merely because it deals with aliens or treats them in a manner that differs from the manner in which it treats citizens. For example, although the Constitution vests in Congress alone the power to "establish an uniform Rule of Naturalization" (Art. I, § 8, cl. 4) for the Nation as a whole, the states are not barred by the Naturalization Clause from *applying* the rule adopted by Congress for purposes of distinguishing between aliens and citizens for proper state purposes. See, *e.g.*, *Ambach* v. *Norwick*, 441 U.S. 68 (1979); *Foley* v. *Connelie*, 435 U.S. 291 (1978). So it is with respect to the subject of aliens generally. Although the federal government is vested with exclusive authority to establish the terms for the admission and residence of aliens in the United

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[6] We agree with the court of appeals in No. 80-1538 (J.S. App. A-13 & n.13) and the district court in No. 80-1934 (J.S. App. 75-87), essentially for the reasons given in their opinions, that § 21.031 is not preempted by Articles 31 and 47 of the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, or by Articles 55 and 56 of the United Nations Charter.

States, a state does not necessarily infringe upon the federal government's exclusive power in the area of immigration and foreign relations by adopting for proper state purposes the standards established by Congress for the regulation of immigration. *De Canas* v. *Bica*, *supra*, 424 U.S. at 355. This includes, as in the present case, attaching consequences to the fact that an alien present in a state has not satisfied the terms of entry established by Congress.

Thus, at least where the state law in question is intended to deal with local problems caused by illegal immigration and has not been shown to have any more than a speculative and indirect incremental impact on immigration, the state's adoption of standards embodied in federal law should not be deemed a proscribed regulation of immigration. *De Canas* v. *Bica*, *supra*, 424 U.S. at 355-356. No finding of a significant impact on immigration has been made here (see 80-1538 J.S. App. A-29; 80-1934 J.S. App. 60-61), and the record in No. 80-1934 suggests that § 21.031 has had no impact on immigration. I Tr. 104-107; III Tr. 427-428; VI Tr. 92-93.[7] Accordingly, Section 21.031 of the Texas Education Code is not a constitutionally proscribed regulation of immigration.

2. There remains the question whether Section 21.031 of the Texas Education Code is preempted by the Immigration and Nationality Act, even if it is not a constitutionally impermissible regulation of immigration as such.

The Immigration and Nationality Act sets forth detailed eligibility criteria for admission of aliens into the United States (8 U.S.C. (& Supp. III) 1182 and 8 U.S.C. 1184) and establishes detailed procedures for the exami-

[7] One of the grounds on which appellants have sought to justify § 21.031 is that it would lessen the incentive for undocumented aliens to enter the United States and thereby diminish illegal immigration. But this is only one of several justifications offered by appellants. Accordingly, here, as in *De Canas* v. *Bica*, the Court is not faced with a situation where regulation of immigration is the sole purpose of a state law, or where the immigration the state law is partially designed to deter is congressionally approved immigration.

nation of aliens who seek to enter the United States. It also provides for the exclusion of aliens who do not qualify for entry (8 U.S.C. 1201 *et seq.*), and for the deportation of aliens who are present in the United States in violation of the immigration laws. 8 U.S.C. (& Supp. III) 1251 *et seq.*[8] We do not interpret these provisions to preempt a state statute such as § 21.031, at least to the extent that local school districts in Texas look to *federal* law and administrative decisions in determining whether an alien child is a "legally admitted alien" for purposes of his entitlement to be admitted to public school without payment of tuition.[9] This conclusion is compelled by *De Canas* v. *Bica*, *supra*.

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[8] Any alien who has entered the United States without the inspection prescribed by law or was excludable at the time of his initial entry is subject to deportation. 8 U.S.C. 1251(a)(1) and (2). However, unless an alien subject to deportation departs voluntarily, he may be physically removed from the country only after he has been found to be subject to deportation in an administrative hearing, 8 U.S.C. 1252, subject to judicial review in the court of appeals, during which deportation is stayed. 8 U.S.C. 1105a(a)(3). In addition, under 8 U.S.C. 1325, any alien who enters the United States at a time or place other than as designated by immigration officers, eludes examination or inspection by such officers, or obtains entry by a willful concealment of a material fact or willfully false or misleading representation, is, for the first such offense, guilty of a misdemeanor punishable by up to six months' imprisonment or a fine of not more than $500. Subsequent convictions for such offenses are felonies.

[9] The phrase "legally *admitted* alien" (emphasis added) suggests that § 21.031 does not permit the exclusion from public school of (or the charging of tuition to) an alien whose initial entry into the United States was lawful but whose presence subsequently became unlawful because of the commission of an act rendering him deportable. In such circumstances, from the state's perspective, the alien properly should be viewed as continuing to be lawfully present under federal law until officials of the federal government find him to be deportable. For example, determinations by the states that an alien should be divested of his status as an alien lawfully admitted for permanent residence (see *Saxbe* v. *Bustos*, 419 U.S. 65 (1974)) or is subject to deportation would, in our view, involve a far more substantial interference with the administration of the federal immigration laws than would a state determination whether the alien had been lawfully admitted. In the former situation, the

In *De Canas* the Court sustained a California statute that imposed criminal sanctions on an employer who knowingly employed an alien who was not entitled to lawful residence in the United States if such employment would have an adverse effect on lawfully resident workers. The Court stressed that the California statute was tailored "to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens" and thereby "focuse[d] directly upon these essentially local problems and [was] tailored to combat effectively the perceived evils." 424 U.S. at 357. In the instant case, Texas, in enacting Section 21.031 of its Education Code, has similarly sought to lessen what it has perceived to be the adverse local effects of illegal immigration on its school districts and its lawfully resident student population. In matters of education, perhaps even more than

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responsible state officials themselves would be required to adjudicate an alien's status under the immigration laws; in the latter, the state officials only would need to determine whether appropriate *federal* officials had determined that the alien could be lawfully admitted. Similar considerations might apply with respect to certain classes of nonimmigrants who were lawfully admitted for a temporary period but who then overstayed their visas. See 8 U.S.C. 1255; *Elkins* v. *Moreno*, 435 U.S. 647, 666-668 (1978).

For like reasons, we do not believe that a local school district, in determining whether an alien had been "legally admitted," properly may look behind the Attorney General's decision to admit an alien (8 U.S.C. (& Supp. III) 1182(a)), to parole him into the United States (8 U.S.C. 1182(d)(5)), or to waive the requirement of proper documentation in a particular case (8 U.S.C. 1182(d)(4)), in order to determine whether the alien was *in fact* eligible for entry. Such decisions are vested in the Attorney General, and the Supremacy Clause prohibits the states from redetermining these questions of federal law.

Finally, we assume that the reference in Section 21.031 of the Texas Education Code to "legally admitted aliens" includes not only aliens whose initial entry was lawful under federal law, but also aliens who entered the United States unlawfully but subsequently were permitted under federal law to remain in the United States. See, *e.g.*, 8 U.S.C. (& Supp. III) 1253(h) (withholding of deportation where the alien may be subject to persecution); 8 U.S.C. (& Supp. III) 1254 (suspension of deportation and adjustment of status).

employment, such measures are well "within the mainstream of * * * police power regulation." *De Canas* v. *Bica*, *supra*, 424 U.S. at 356.

The Court acknowledged in *De Canas*, however, that even state legislation that regulates local matters in a manner that is consistent with pertinent federal law must give way to paramount federal laws. But "[o]nly a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "'the clear and manifest purpose of Congress'" would justify that conclusion." 424 U.S. at 357, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1963), and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In *De Canas*, the Court uncovered no "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." 424 U.S. at 358. The same is true here, for we are aware of no indication that Congress intended to preclude even harmonious state laws touching specifically on the education of aliens who are illegally present in the United States. Moreover, in *De Canas*, a proviso to 8 U.S.C. 1324 providing that the prohibition in that section against the harboring of illegal entrants does not render an employer liable for the *employment* of such aliens could have been viewed as a deliberate congressional judgment that employment of aliens should not be made subject to criminal sanctions even by the states.[10] There is no similar provision that could be thought to bear upon the question of state education of aliens who entered the United States unlawfully.[11]

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[10] The United States so argued in its Memorandum filed at the petition stage in *De Canas* at the Court's request. See Memorandum for the United States as Amicus Curiae, No. 74-882, 1974 Term, at 5.

[11] Of course, in *De Canas*, the Court did find some *affirmative* evidence of congressional intent to permit state regulation of employment of undocumented aliens. 424 U.S. at 361-362. There

3. Although we have concluded that § 21.031 is not preempted by the Immigration and Nationality Act, we would view quite differently a state statute that excluded from public schools (or permitted the charging of tuition to) alien children who were lawfully admitted into the United States. In the case of aliens lawfully admitted for permanent residence, for example, Congress has made a judgment that this status should confer on the alien the right generally to the equal benefit of the laws of the state and to full participation in the community. See, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 376-380 (1971); see also *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 420 (1948). When Congress, through the INS, has conferred that status, a state may not deny to the aliens concerned the opportunity to earn a livelihood: such action by the state would be "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live

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is, to our knowledge, no comparable indication in the legislative history of a congressional intent that states be permitted to affect the education of such aliens. But we do not attach much significance to this point, because the education in question is furnished by the state itself, not by private parties, as was true of the employment involved in *De Canas*. Congress cannot be expected to authorize the states to establish rules for the conduct of their own public schools.

For similar reasons, we do not find *De Canas* distinguishable on the ground that it involved the *employment* of aliens, a matter that the immigration laws subject to tight regulation by requiring permission of the Attorney General before any nonimmigrant, even one present legally, may work in this country. 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14). It is true that education of aliens is not a similarly central concern of the immigration laws and that a state's denial of a free education to aliens present in the United States cannot, therefore, be said to further one of the central purposes of federal law. But the holding in *De Canas* was not dependent upon a finding that the California statute actually aided in the accomplishment of the purposes of the immigration laws. It was sufficient that the California statute was not *inconsistent* with federal law. The Court should not lightly find an inconsistency in the present setting either, in view of Congress' traditional deference to state authority in the area of education.

where they cannot work." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915).[12] In our view, it would be equally inconsistent with the congressional judgment that a child should be admitted as a permanent resident alien for a state to deny the child a benefit that is otherwise universally available in the state, such as free public education. See also *Graham* v. *Richardson*, *supra* (public assistance).

Similar problems would arise under a state statute that rendered ineligible for certain generally available state programs nonimmigrants who are lawfully present in the United States for a temporary period. Where a nonimmigrant alien child's visa permits him to assume a residency in a state of such a character or duration that he would be entitled under state law to a free public education but for his status under the federal immigration laws, the state's denial of a free education to the child ordinarily would be inconsistent with the congressional judgment to admit the child and therefore invalid under the Supremacy Clause. Cf. *Elkins* v. *Moreno*, 435 U.S. 647, 658, 663-669 (1978); *Toll* v. *Moreno*, 441 U.S. 458 (1979).

The question of the application of state law to aliens who are lawfully present in the United States may soon become directly relevant to the central issue in this case. The Administration has developed and presented to the Congress the outline of a proposal to address the problem of illegal immigration. One feature of the proposal is the creation of a new legal status for aliens who were present in the United States in violation of the im-

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[12] The Equal Protection Clause does permit a state to confine eligibility for certain positions in state employment to citizens where the person occupying the position must exercise important governmental functions. *Ambach* v. *Norwick*, *supra*; *Foley* v. *Connelie*, *supra*. These cases did not consider the extent to which Congress, pursuant to its plenary powers over immigration and naturalization (or pursuant to Section 5 of the Fourteenth Amendment) could restrict the discretion a state has in this regard under the Equal Protection Clause standing alone. Cf. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

migration laws prior to January 1, 1980.[13] If not otherwise excludable, these aliens could apply for the status of "renewable term temporary resident." This status would be subject to renewal every three years, and would allow the alien to apply for permanent resident alien status after 10 years. If Congress adopts the Administration's proposal, it will thereby sanction the long-term presence in the country of the aliens who qualify for and attain this new status.[14] In that event, under the principles discussed above (and absent a contrary provision in the congressional enactment), it may well be that local school districts in Texas could not exclude from their public schools those alien children who initially entered the United States unlawfully but who subsequently were granted the status of "renewable term temporary resident." Cf. note 9, *supra*.

4. Congress' plenary control over immigration and naturalization is significant for an additional reason as well. Whatever restraints the Equal Protection Clause, standing alone, may impose on the states in excluding aliens (whether or not lawfully admitted into the United States) from state programs, it is clear that the Constitution does not impose comparable restrictions on Congress. For, as the Court stated in *Mathews* v. *Diaz*,

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[13] See Statement by the President, United States Immigration and Refugee Policy, 17 Weekly Comp. of Pres. Doc. 829, 830 (July 30, 1981); Testimony of William French Smith, Attorney General, Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, and the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 9-10 (July 30, 1981). Because the transcript of the joint hearing before the two subcommittees has not been printed, we are lodging with the Clerk ten copies of the Attorney General's prepared remarks.

[14] Aliens granted this new status would be ineligible for welfare, federally assisted housing, food stamps, and unemployment compensation. They also would not be eligible to bring their spouses and children into the United States, although they could leave the United States for temporary visits to their homeland without losing their temporary resident status in this country. Statement of the Attorney General, *supra*, note 13, at 10.

supra, 426 U.S. at 78-79 (footnote omitted), "a host of constitutional and [federal] statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." Thus, although "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, * * * a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 85; see also *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8.

Applying this reasoning, the Court in *Mathews* v. *Diaz* sustained against an equal protection challenge under the Due Process Clause of the Fifth Amendment a provision in the Medicare Act, 42 U.S.C. 1395*o*(2), which grants eligibility for medicare benefits to citizens and those aliens who have been admitted for permanent residence and have resided in the United States for five years. Significantly, the Court in *Mathews* v. *Diaz*, in considering the power of the federal government to exclude some aliens from participation in federal programs, observed that

> the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.

426 U.S. at 80 (first and third emphasis in original). The court made a similar point later in the opinion, stating that in establishing eligibility requirements for Medicare benefits, "surely Congress would at least require that the alien's entry be lawful." 426 U.S. at 82.

Pursuant to its power, recognized in *Mathews* v. *Diaz*, to limit the receipt of federal benefits by aliens who entered the United States illegally, Congress has excluded such aliens from participation in a number of federal programs in addition to Medicare. See 7 U.S.C. (Supp. III) 2015(f) (food stamps); 26 U.S.C. (& Supp. III) 3304(a)(14)(A) (unemployment compensation); 42 U.S.C. 1382c(a)(1)(B) (Supplemental Security Income). Similar restrictions have been adopted in regulations promulgated under other federal statutes. See 42 C.F.R. 435.402(b) (Medicaid); 45 C.F.R. 233.50 (AFDC); see also 45 C.F.R. 155.4(b), 157.3(b) and 190.4(a)(4) (various higher education grant programs). Although no comparable limitation has been imposed on the use of federal funds granted to local school districts under Title I of the Elementary and Secondary Education Act of 1965 or other federal statutes providing financial aid to public schools, it seems clear that such a limitation would be permissible under the holding in *Mathews* v. *Diaz*. Thus, whether or not the Court holds § 21.031 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, the federal government will retain broad authority to provide for the exclusion from federally funded programs of aliens who have entered or remained in the United States in violation of the immigration laws.[15]

B. Section 21.031 of the Texas Education Code is not Preempted by Title I of the Elementary and Secondary Education Act

Section 21.031 of the Texas Education Code is not preempted by Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. (Supp. III) 2701 *et seq.*[16] Under Title I, state and local education

[15] Under appropriate circumstances, we believe that Congress, in order to deter illegal immigration, could require the exclusion of aliens who entered the United States in violation of federal law from certain *state* programs as well, even if those programs did not receive federal funding to which such a requirement was imposed as a condition.

[16] Title I is a voluntary program, and the Secretary of Education is empowered to withhold payments if a state or local education

agencies that choose to participate receive federal funds for programs designed to supplement state and local funds used for the schooling of "educationally deprived" children.

Preemption of state law by a federal statute is "not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, No. 79-1336 (Mar. 9, 1981), slip op. 5, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, 373 U.S. at 142; see also *De Canas* v. *Bica, supra*, 424 U.S. at 356. Certainly the nature of the subject matter involved in this case, education, does not suggest a congressional intent to preempt state law. Education traditionally has been—and remains—primarily the province of the states rather than the federal government, and Title I clearly contemplates extensive state regulation of all aspects of this field. See H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 4 (1978).

Nor has Congress, in enacting ESEA, "unmistakably * * * ordained" the preemption of state laws such as § 21.031. Nothing in Title I expressly requires the states to furnish a free public education to alien children who entered the United States in violation of the immigration laws, and, as explained below, the exclusion of such children does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

It might be argued that § 21.031 is contrary to the broad congressional policy, embodied in Title I, of "provid[ing] financial assistance * * * to local educa-

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agency fails to comply with the requirements of the Act. 20 U.S.C. (Supp. III) 2836. Thus, even if § 21.031 were thought to be incompatible with Title I, the remedy prescribed by Congress would be for the Secretary to withhold federal funds from the State of Texas or from those local school districts in the State that declined to admit (or charged tuition to) aliens who were not lawfully admitted, not for a court to enter injunctive relief prohibiting the implementation of § 21.031.

tional agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs * * * which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. (Supp. III) 2701. But such a general statement of policy, standing alone, cannot form the basis for preemption of all state laws that may have an adverse effect on that policy. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 22; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133-134 (1978).[17] Moreover, even this statement manifests an intent to accomplish the statutory purpose by assisting local educational agencies with their programs, and it therefore is not indicative of an intent to supplant local decision-making authority with respect to eligibility for such programs.

It might also be argued that § 21.031 is preempted because Texas receives additional funds under Title I due to the presence within its borders of substantial numbers of alien children of school age who entered the United States in violation of the immigration laws. The basis for such an argument would be that the amount of funds received by a state under Title I depends in part upon the number of school-aged children in the state from families below the poverty level, as counted in the 1970 census, 20 U.S.C. (Supp. III) 2711(c)(2), and that illegal entrants are included in those census figures.[18] However, it does not appear that census data were used because Congress affirmatively desired the number of undocumented aliens of school age to affect the amount of funds received by a state. Rather, census data were used, despite their recognized inadequacies, because "no other recent statistical base [was] available which [gave] more accurate counts of poverty for the

[17] For the same reason, § 21.031 is not preempted by the broad statement of policy contained in the Bilingual Education Act, 20 U.S.C. (Supp. III) 3222(a).

[18] The 1970 census, like the 1980 census, enumerated undocumented aliens along with all other persons in the states. See page 24 & note 22, *infra*.

entire country down to the local level * * *." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 9 (1978). See also H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 7-11 (1974).[19]

But even if Congress had chosen to use census figures for the allocation of Title I funds in part *because* they would include undocumented alien children in the allocation formula, this decision would not in itself furnish sufficient support for the conclusion that Congress intended to *require* the states to furnish all such children a free public education as a condition to the receipt of any Title I funds. For even then the allocation formula could be viewed as a means of encouraging, rather than mandating, the furnishing of a free public education to children who entered the United States in violation of the immigration laws. See *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 16.[20] Furthermore, as the district court in No. 80-1934 observed (J.S. App. 73), the statutory scheme demonstrates in other respects that accomplishment of the congressional purpose of aiding local programs for educationally deprived children does not require that every child included in the formula for allocation of Title I funds must actually be served by a special Title I program established by a local education agency.

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[19] The formula devised by Congress for apportioning Title I funds also depends in part upon the number of school-aged children in the state from families receiving payments under the Aid to Families with Dependent Children (AFDC) program, (see 20 U.S.C. (Supp. III) 2711(a) and (c)), a program from which aliens who entered the United States in violation of the immigration laws are *excluded*. 45 C.F.R. 233.50. Thus, Congress, in apportioning Title I funds, chose different formulas while recognizing that none was wholly satisfactory. See H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 8-11 (1978); H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 7-13 (1974).

[20] Moreover, even if such children are not admitted to public schools, they may benefit from Title I if they attend private schools. See 20 U.S.C. (Supp. III) 2740.

II. ALIENS WHO HAVE ENTERED OR REMAINED IN THE UNITED STATES IN VIOLATION OF FEDERAL IMMIGRATION LAW AND WHO ARE PRESENT IN A STATE ARE "PERSONS WITHIN ITS JURISDICTION" FOR PURPOSES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment provides in pertinent part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

An alien, whatever his status under the immigration laws, surely is a "person" in any ordinary usage of the term. And this Court has made clear that *all* aliens, even those whose presence in the country is unlawful, are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); see also *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). The word "persons" in Section 2 of the Fourteenth Amendment, which provides for the apportionment of Representatives among the states according to "the whole number of persons in each State,"[21] also has been interpreted to permit (and even to require) the counting for apportionment purposes of aliens who are present in the United States in violation of the immigration laws. See *Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.), appeal dismissed, 447 U.S. 916 (1980), aff'd mem., No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981).[22] No reason appears why the term "person"

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[21] See also U.S. Const. Art. I, § 2, cl. 3.

[22] See also Brief for the Federal Respondents in Opposition, *Federation for American Immigration Reform* v. *Baldrige*, No.

in the Equal Protection Clause in Section 1 of the Fourteenth Amendment should not be given the same all-embracing construction, encompassing aliens who are unlawfully present in the United States. See *Holley* v. *Lavine*, 529 F.2d 1294 (2d Cir.), cert. denied, 426 U.S. 954 (1976); *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975); *Williams* v. *Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971); *Hernandez* v. *Houston Independent School District*, 558 S.W.2d 121, 123 (Tex. Civ. App. 1977); cf. 71 Cong. Globe 2766 (1866) (remarks of Sen. Howard); *United States* v. *Otherson*, 637 F.2d 1276 (9th Cir. 1980), petition for cert. pending, No. 80-6548. Indeed, this Court has made clear that the Due Process and Equal Protection Clauses of the Fourteenth Amendment "are *universal* in their application to *all* persons within the territorial jurisdiction" of the state. *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369 (emphasis added).

This conclusion that aliens present in a state in violation of federal law are protected by the Equal Protection Clause is not altered by the fact that the Clause refers to any person "within its [*i.e.*, the state's] jurisdiction." Considering the word "jurisdiction" in the Equal Protection Clause in a geographic sense (see *Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 369 [23]), the alien appellees in these cases, who *reside* in Texas, plainly come within the reach of the Clause. And the result is the same if, as appears, the phrase "within its jurisdiction" was intended simply to define the class of persons guaranteed the equal protection of a state's laws to consist of all persons who are *subject* to those laws. As the Court said in *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350 (1938) (emphasis added):

80-975, 1980 Term, at 10-12; Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 845-848 (1981).

[23] The Court stated in *Yick Wo*, at the cited page (emphasis added), that the Equal Protection Clause is "universal in [its] application to all persons within the *territorial* jurisdiction" of a state.

> [T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, *within its own jurisdiction.* It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders.

Compare *Blake* v. *McClung*, 172 U.S. 239, 260-261 (1898).

It could not seriously be contended that aliens present within the borders of Texas in violation of federal law are not "within its jurisdiction" in the sense that Texas may not enforce its criminal laws or other police power measures against them; to the contrary, the State seeks to enforce one of its laws, § 21.031 of the Education Code, against such aliens in these very cases. And, of course, they are subject not only to such regulation, but to service of process and to suit, criminal or civil. The Equal Protection Clause therefore affords some measure of protection to aliens present in violation of the immigration statutes in those situations in which they *are* subjected to the operation of state law.

This is not to say, of course, that such aliens necessarily must be treated in precisely the same fashion as all other aliens, either in the circumstances of this case or in other contexts. We do not address that issue here. But, without the protection of the Equal Protection Clause, a state might be free to discriminate against or among such aliens on the basis of their race, color, sex or national origin or to impose more severe criminal sanctions on any such aliens who violate the state's generally applicable criminal laws than would be imposed on citizens or legally admitted aliens. Cf. 18 U.S.C. 242. But see note 26, *infra.*[24]

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[24] The cases upon which appellants rely are wholly inapposite. *Blake* v. *McClung*, *supra*, 172 U.S. at 260-261, the only cited case even to consider the Equal Protection Clause, simply held that a corporation organized and doing business outside of Tennessee

Finally, because aliens who are unlawfully present in the United States are covered by the equal protection component of the Fifth Amendment Due Process Clause (*Mathews* v. *Diaz*, *supra*, 426 U.S. at 77-78), the consequence of finding the Equal Protection Clause inapplicable to such aliens might be that they would be entitled to *less* protection from disparate treatment by the states than by the federal government.[25] This anomalous result would stand the Court's holding in *Mathews* v. *Diaz*, on its head.[26]

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and not subject to the jurisdiction of that State's courts by service of process was not within the jurisdiction of Tennessee for purposes of the Equal Protection Clause. That decision therefore does not suggest that an alien residing *within* a state is not "within its jurisdiction" for purposes of that Clause.

Leng May Ma v. *Barber*, 357 U.S. 185 (1958); *Schneider* v. *INS*, 65 F. Supp. 377 (W.D. Wash. 1946); and *In re Simmiolkjier*, 71 F. Supp. 553 (D.V.I. 1947), all presented questions of statutory construction under the immigration laws. In *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the court simply held that an alien who entered the country illegally could not bring an action to compel the Secretary of State to specify reasons for the denial of a visa. *De Canas* v. *Bica*, 424 U.S. 351 (1976), was a preemption case that similarly involved only an interpretation of the immigration laws. None of these decisions addressed an equal protection issue.

Finally, *United States* v. *Tsuda Maru*, 479 F. Supp. 519 (D. Alaska 1979), involved an equal protection challenge by a Japanese company to a *federal* statute that barred that company's vessels from fishing in the territorial waters of the United States. That case, involving the right of a foreign company to *enter* the United States' territorial waters, obviously sheds no light on whether aliens who are residing within the United States are protected by the Equal Protection Clause of the Fourteenth Amendment.

[25] Of course, if the Equal Protection Clause were held inapplicable, some protection from arbitrary or invidious treatment of undocumented aliens might well be furnished by the Due Process Clause of the Fourteenth Amendment.

[26] See 426 U.S. at 84-86; see also *Nyquist* v. *Mauclet*, 432 U.S. 1, 7 n.8 (1977).

CONCLUSION

The court of appeals correctly held that the complainants in these cases are persons within the jurisdiction of the State of Texas within the meaning of the Equal Protection Clause of the Fourteenth Amendment, and that the state and local laws at issue here do not violate the Supremacy Clause. The United States takes no position on the other question presented.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

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